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No.

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ANGELO LaPIETRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner's conviction and consecutive sentences on both the conspiracy count and the substantive *Pinkerton* liability counts violates the Double Jeopardy Clause as interpreted by recent decisions of this Court.
 2. Whether this Court's decision in *Bourjaily v. United States* announced a new rule for conspiracy trials which should be given only prospective application.
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NOTE: Petitioner herein respectfully requests the Court's permission to incorporate issues raised by co-defendants John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo and Milton Rockman in their petitions for a writ of certiorari, filed in this Court, insofar as said issues may be determined to be applicable to petitioner herein.

LIST OF PARTIES

The parties to the proceedings below were the United States of America and petitioner Angelo LaPietra, and John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, and Milton John Rockman.

Separate petitions for certiorari will be filed by Cerone, Aiuppa, Lombardo and Rockman.

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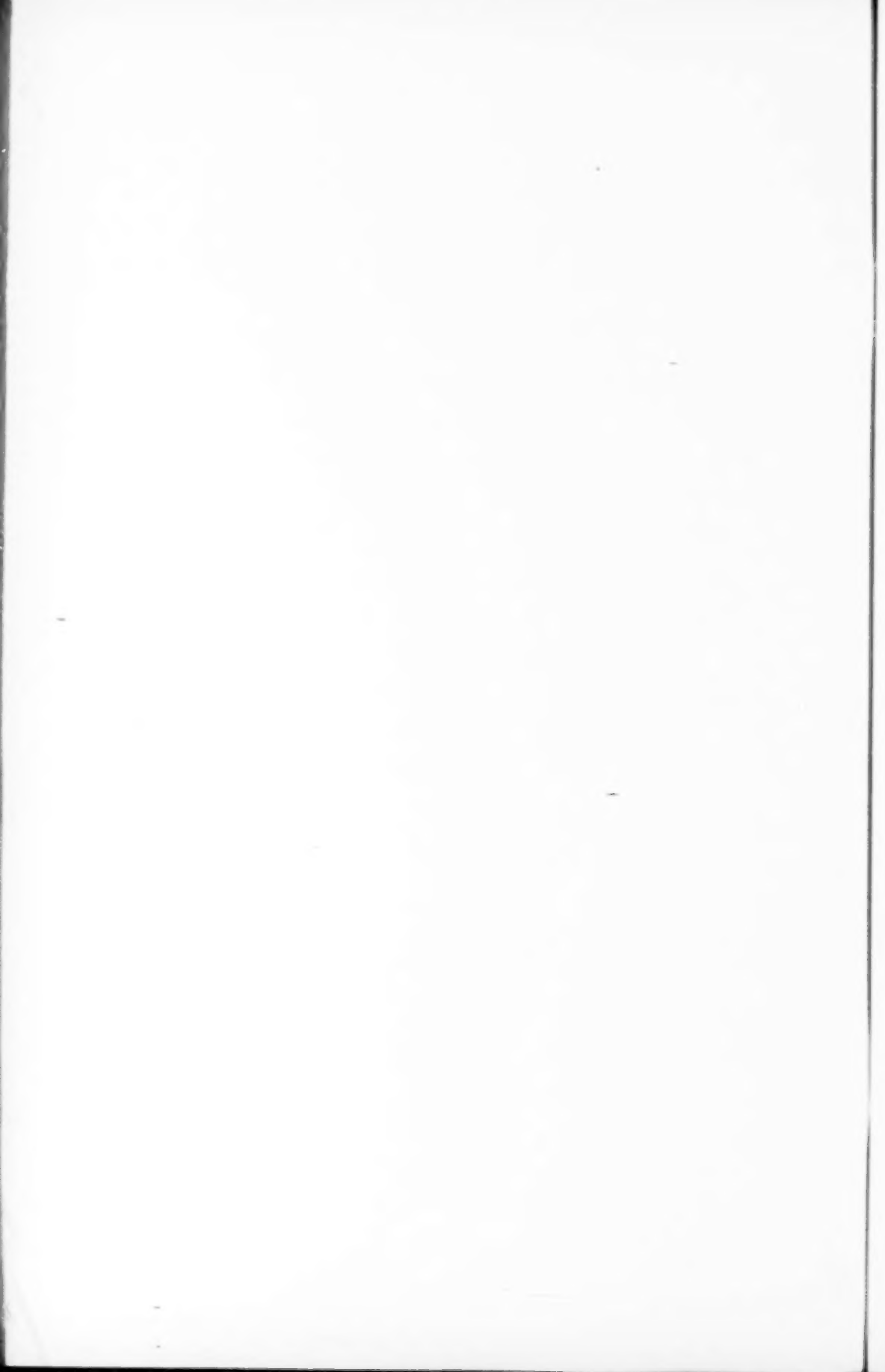
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**PETITION FOR WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT**

The petitioner Angelo LaPietra respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on October 8, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 830 F.2d 938 (8th Cir. 1987), and is reprinted as Appendix A to this petition at A-1.

JURISDICTION

The jurisdiction of the district court was predicated upon an indictment charging violations of 18 U.S.C. §§ 371 and 1952.

On petitioner's appeal and the appeals of his co-defendants, the Eighth Circuit on October 8, 1987, entered a judgment and an opinion affirming the judgments of conviction and sentence. Petitions for rehearing were timely filed by John Peter Cerone, Joseph John Aiuppa and Milton John Rockman. No petition for rehearing was filed by Joseph Lombardo or by petitioner LaPietra.

The petitions for rehearing of Rockman, Aiuppa and Cerone were denied on December 15, 16 and 23, 1987, respectively.

This petition for certiorari is being filed within 60 days from the denial of Cerone's petition for rehearing on December 23, 1987, pursuant to Supreme Court Rule 20.4. (A copy of the order denying Cerone's petition for rehearing is included as Appendix B to this petition at B-1.)

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution of the United States (Double Jeopardy Clause):

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."

STATEMENT OF THE CASE

Petitioner Angelo LaPietra, John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, Milton Rockman and several other co-defendants were charged with conspiracy to violate the Travel Act and with seven substantive violations of the Travel Act, in violation of 18 U.S.C. §§ 371 and 1952. More specifically, the indictment charged a conspiracy to maintain an unlawfully hidden interest in the gaming enterprises of Allen Glick in Las Vegas, Nevada, and with skimmiing and distributing money from the Stardust and Freemont Casinos owned by Glick, in violation of the Nevada gaming laws. It was alleged that the co-conspirators obtained control of the casinos by helping Glick obtain financing from the Teamsters Union Central States Southeast and Southwest Areas Pension Fund, through their alleged influence over teamster officials in Kansas City, Milwaukee and Cleveland.

The conspiracy count of the indictment charged 75 overt acts in furtherance of the conspiracy, many of which were specific acts of travel in interstate commerce or use of the telephone (an interstate facility).

The seven substantive counts charged several specific acts of travel or use of the telephone by a named conspirator, which acts were also included in the overt acts alleged in furtherance of the conspiracy and charged in count one.¹ Although each substantive count named only one conspirator as a principal, all of the other conspirators were also included in the substantive counts as aiders and abettors, in violation of 18 U.S.C. § 2. Except for count

¹ Count two (overt act 74); count 3 (overt act 27); count 4 (overt act 32); count 5 (overt act 33); count 6 (overt act 34); count 7 (overt act 38); count 8 (overt act 39).

7, which named co-defendant John Peter Cerone as a principal, neither petitioner nor any of the other four co-defendants who were found guilty by a jury and whose convictions were affirmed by the Court of Appeals, were named as principals in the substantive counts but merely as aiders and abettors, and their guilt was predicated entirely upon vicarious liability flowing from their alleged participation in the conspiracy. The jury was instructed, pursuant to *Pinkerton v. United States*, 328 U.S. 640 (1946), that a defendant may be found guilty of the substantive offenses, even if he did not participate in the acts constituting such offenses, if he was a member of the conspiracy at the time such offenses were committed. (Instruction No. 49)

According to the government's theory of the case, several of the conspirators were members of organized crime "groups" in midwestern cities. The government's evidence showed that in early 1974, Allen Glick sought the assistance of co-defendant Frank Balistrieri, allegedly a member of the Milwaukee "group," in obtaining a loan from the Teamster's Pension Fund to buy the Stardust and Freemont casinos. Balistrieri in turn obtained the assistance of Nick Civella in Kansas City and Milton Rockman in Cleveland, each of whom influenced a trustee of the pension fund.

After Glick obtained the loan, Balistrieri and his partners forced Glick to promote alleged co-conspirator Frank Rosenthal to a management position, from which he supervised the skimming of moneys from the casinos.

Although the skimmed money was initially shared by the Kansas City, Milwaukee and Cleveland groups, after a dispute arose among the groups, some members of the Chicago group allegedly resolved the dispute and thereafter shared in the proceeds of the skimming. According

to the government's theory of the case, Aiuppa, Cerone, Lombardo and petitioner were part of the Chicago group.

Co-defendant Carl DeLuna kept cryptic notes, later seized during execution of a search warrant, which the government contended were records of some of the conspirators' transactions. According to the government's theory of the case, these notes referred to various alleged conspirators by code names and were a record of the receipt and distribution of the proceeds of the skimming. The government contended that these notes referred to petitioner as "Pitsacuni" and the "code names" 22, 21, Hambone, Little T, Deerhunter, Deer, etc., referred to other members of the alleged conspiracy.

Pursuant to court authorized electronic surveillance conducted during 1978, 1979 and 1980, the government intercepted numerous telephone conversations. According to the government's evidence, a person identified as petitioner called the residence of Carl DeLuna in Kansas City on October 25, 1978, November 26, 1978, and January 6, 1979, looking for DeLuna. On two of these occasions, the caller spoke with DeLuna and arranged to meet him later. (Government's Exhibits 247(a), 282, 285, 286, 288). The government also contended that petitioner called the residence of Anthony Chiavola, Sr. on April 29, 1979, June 1, 1979, and June 5, 1979, looking for Chiavola, Sr. On one of these occasions the caller reached Chiavola and they arranged to get together. (Exhibits 329, 357(a), 358) During none of these conversations was anything said about Las Vegas, the teamsters, skimming money or anything else which was alleged to be part of the conspiracy.

There was also evidence that on August 16, 1978, someone (identified as either petitioner or Cerone) met alleged co-conspirator Rosenthal at Midway Airport in Chicago. They drove to 26th and Princeton where an FBI agent said he saw several people on the corner conversing in

small groups. Among those present were petitioner, Rosenthal, Cerone and Aiuppa. (Vol. 52, pp. 20-23, 25-27, 41, 66-69)

On October 22, 1978, a car driven by petitioner arrived at the Chiavola residence and Aiuppa and Cerone got out and entered the residence. Petitioner parked the car and also entered. (Vol. 9, pp. 148-52)

On another occasion, petitioner was observed entering the home of Chiavola, from which he left a few minutes later and went home. (Vol. 42, pp. 20-23) And a few weeks later, Chiavola drove to an address on 26th Street in Chicago where he parked and talked to petitioner. (Vol. 44, pp. 69-71) There were no other surveillances or telephone conversations of petitioner. None of the many government witnesses who testified concerning the alleged conspiracy ever related a conversation with petitioner or ever mentioned him.²

The DeLuna notes and other co-conspirator statements were offered in evidence pursuant to Fed.R.Evid. 801(d)(2) (E). At the conclusion of the government's case, the district court admitted the co-conspirator statements upon a finding that the government had shown by a preponderance of the independent evidence that a conspiracy existed and that the alleged co-conspirators against whom the evidence was offered had joined the conspiracy. This ruling followed the traditional rule, approved by the Eighth Circuit in *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978), based on *Glasser v. United States*, 315 U.S.

² Although the Court of Appeals Opinion states that the "government produced direct evidence of the conspiracy and appellants' participation in it," and that "Allen Glick and Angelo Lonardo testified to their personal knowledge of appellants' activities" (Opinion, p. 19, fn. 10), neither of these witnesses ever mentioned petitioner.

60 (1942), that co-conspirator statements are not admissible against a particular defendant unless it is shown by independent evidence that the particular defendant was a member of the conspiracy.

The jury was instructed, again in terms of the traditional pre-*Bourjaily* rule that

“... in determining whether a particular defendant was a member of a conspiracy, if any, the jury should consider only such evidence as there is of his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established beyond a reasonable doubt that a conspiracy exists, and that he was one of its members.” (Vol. 58, pp. 53-54)

At the conclusion of the trial the jury found the five remaining defendants guilty on all counts.

The trial court later remarked at sentencing that the evidence against petitioner showed that he was not in a leadership position and was not the most culpable of the alleged conspirators. (Tr. March 27, 1986, p. 11)

Petitioner was sentenced to consecutive terms of two years on each count, for a total of 16 years. Co-defendants Aiuppa, Cerone, Lombardo and Rockman were similarly sentenced to consecutive terms totaling from 16 to 28½ years.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. After briefs were filed, the case was orally argued on May 11, 1987. About six weeks after oral argument, on June 23, 1987, this Court filed its opinion in *Bourjaily v. United States*, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

On October 8, 1988, the court of appeals affirmed petitioner's conviction and filed an opinion which relied on this Court's opinion in *Bourjaily*.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S CONVICTION ON BOTH CONSPIRACY AND THE SUBSTANTIVE *PINKERTON* VICARIOUS LIABILITY COUNTS VIOLATED THE DOUBLE JEOPARDY CLAUSE AS INTERPRETED BY RECENT DECISIONS OF THIS COURT.

Certiorari should be granted to consider the question of whether consecutive sentences imposed on the *Pinkerton* vicarious liability counts violates the double jeopardy prohibition against multiple punishments for the same offense. It has been suggested that recent decisions of this Court interpreting and applying the *Blockburger* test in the area of cumulative punishment may necessitate a re-examination of the double jeopardy reasoning of *Pinkerton*. This case presents a direct interface between *Blockburger* and *Pinkerton* vicarious liability of a conspirator for substantive offenses which he neither actually committed nor aided and abetted.

1. Petitioner was convicted of conspiracy to violate the Travel Act (18 U.S.C. § 1952) and seven substantive violations of the Travel Act, which were also alleged as overt acts in the conspiracy count. Petitioner was not named as a principal in any of the substantive counts, but was named along with all other alleged co-defendants as an aider and abettor. Moreover, there was no evidence that petitioner acted as a principal or that he actually aided and abetted any of the principals, and petitioner's conviction on the substantive counts were predicated entirely upon the *Pinkerton* vicarious liability theory.

It was and is petitioner's contention that he was convicted of only one offense—the conspiracy charged in count

one. Yet, by means of the *Pinkerton* vicarious liability, he was found guilty of seven more offenses in which he did not participate, neither as a principal or an aider and abettor. Petitioner's guilt on the substantive *Pinkerton* vicarious liability counts was predicated *solely* upon his participation in the conspiracy, which thus became an *element* of the substantive offense as far as petitioner was concerned. In other words, in order to prove petitioner guilty of the substantive counts in which he was charged, the government had only to prove him guilty of the conspiracy charged in count one.

The court of appeals, in holding that the fact "That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant" (App. A-9), missed the focus of petitioner's entire argument.

The *Pinkerton* instruction was predicated on the 1946 decision of this Court in *Pinkerton v. United States*, 328 U.S. 640 (1946), in which two brothers were charged and convicted of both conspiracy to violate the Internal Revenue Code as principals in several substantive violations, which were also alleged as overt acts in the conspiracy count. Although one of the brothers, Daniel Pinkerton, had nothing to do with the substantive violations, committed by his brother, this Court held that he could be convicted of the substantive offenses solely by reason of his participation in the conspiracy. As pointed out by the court of appeals below, *Pinkerton* also held that there was no double jeopardy violation. However, it has been suggested that the *Pinkerton* holding on double jeopardy was principally concerned with the question of whether one who actually commits the substantive offense could be found guilty of both the substantive offense and conspiracy, and that the Court did not explain the double jeopardy implication of vicarious liability. *United States*

v. Larkin, 605 F.2d 1360, 1367 (5th Cir. 1979).³ In any event, the double jeopardy questions arising from *Pinkerton* should be reviewed in light of the recent decisions by this Court.

2. The question under the Double Jeopardy Clause is whether the conspiracy and substantive offenses are the same—a question simple on its face but of surprising complexity in view of the decisions of this Court. Of course, this Court held that conspiracy and the substantive offense which is the object of the conspiracy are not the same for purposes of double jeopardy, but does this rule still apply in the context of a case where the conspiracy must be established as an essential element of the substantive offense in order to invoke *Pinkerton* vicarious liability? Is the conspiracy a lesser included offense? Correspondingly, are the substantive offenses charged, each of which was alleged as an overt act of the conspiracy, lesser included offenses?

3. The question in this case is complicated by the fact that there is no legislative intent concerning *Pinkerton* vicarious liability because it is a judge-made rule.

Recent decisions of this Court have held that in multiple punishment cases the question is solely one of legis-

³ The holding of the *Pinkerton* case was twofold:

(1) The Court held that “commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses” and that “the plea of double jeopardy is no defense to a conviction for both offenses.” (328 U.S. at 643);

(2) The second holding is that a participant in the conspiracy could be found guilty of substantive offenses committed by another conspirator. The Court’s observation with respect to double jeopardy is related to the first holding of *Pinkerton*, although it may be said to apply to the second holding by implication.

lative intent e.g. *Albernez v. United States*, 450 U.S. 333 (1980), *Missouri v. Hunter*, 459 U.S. 359 (1980). The question is whether Congress intended to punish each violation separately. *Jeffers v. United States*, 432 U.S. 137, 155 (1977). This Court has also pointed out that the “assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.” *Ball v. United States*, 470 U.S. 856, 861 (1985).

In the case of *Pinkerton* vicarious liability, of course, there is no legislative intent because this liability was created by this Court itself in the *Pinkerton* case. In the absence of congressional intent, therefore, it would seem that the question must be resolved by reference to this Court’s other decisions on this subject, including the rule that in criminal cases “when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” *Ball v. United States*, 349 U.S. 81, 83 (1955).

The lower court relied on the legislative history underlying the Travel Act to the effect that Congress did not intend the offense of conspiracy to merge with either the substantive offense or the aiding and abetting statute. But the lower court completely misses the point. Petitioner agrees that there is no “merger” where the defendant *actually commits* the substantive offense or *actually aids and abets* a violation of the substantive offense. But as to *Pinkerton* vicarious liability, there is no Congressional intent because it is a judge-made rule.

4. The traditional test to determine whether offenses are “the same” was formulated by this Court in *Blockburger v. United States*, 284 U.S. 299 (1932). Under *Blockburger*, the test to determine whether Congress intended to impose multiple punishments is “whether each provi-

sion requires proof of a fact which the other does not" (284 U.S. at 304).⁴ The *Blockburger* test has traditionally focused "on the proof necessary to prove the statutory elements for each offense, rather than upon the actual evidence to be presented at trial." (*Illinois v. Vitale*, 447 U.S. 410, 416 (1980)).

Under the traditional *Blockburger* test, the offense of conspiracy was invariably found to be not the same as the substantive offense because the conspiracy charge always required proof of the additional element of an agreement. It has therefore been held, for example, that conspiracy and aiding and abetting are not the same offense under the *Blockburger* test. *Pereira v. United States*, 347 U.S. 1 (1954) Under the facts and government's theory of the petitioner's case, however, the conspiracy and aiding and abetting the principal offense are the same because of the *Pinkerton* vicarious liability theory.

5. The traditional *Blockburger* test appears to have been modified by this Court in *Whalen v. United States*, 445 U.S. 684 (1980). According to the Court of Appeals for the Sixth Circuit, in *Whalen* this Court "modified the abstract approach to the double jeopardy clause" in the context of multiple punishment cases. (*Pandelli v. United States*, 635 F.2d 533, 536). In *Whalen*, as here, the petitioner contended that he was twice punished for the same offense where he had received consecutive sentences imposed under the District of Columbia rape and felony murder statutes. Instead of applying the abstract, tradi-

⁴ The test is sometimes regarded as solely one of statutory construction, which seems to be the prevailing view. *Missouri v. Hunter*, 459 U.S. 359 (1983). But it is also accurate to state that the Court "has long assumed that the *Blockburger* test is also a rule of constitutional stature in multiple punishment cases." 459 U.S. 359, 374 (Marshall, J., dissenting)

tional *Blockburger* approach which would have treated felony murder as theoretically involving different elements from the rape charge (since the predicate felony could also be armed robbery, etc.), the Court found it necessary to consider "the facts alleged in a particular indictment" and observed that "In the present case, however, proof of rape is a necessary element of proof of the felony murder." (445 U.S. at 694). The Court concluded that in the context of the particular case before it that all the elements of the rape case were also present in the felony murder case based on rape, and consequently the Double Jeopardy Clause was violated.

The *Whalen* case was applied to consecutive sentences by the Sixth Circuit in *Pandelli v. United States*, 635 F.2d 533 (6th Cir. 1980). Although the court had previously held that Petitioner's Mann Act and Travel Act convictions were not the same offense under the traditional *Blockburger* approach, the court held that "the intervening interpretation of the Double Jeopardy Clause by the United States Supreme Court establishes that the consecutive sentences imposed upon petitioner do constitute double jeopardy forbidden by the Fifth Amendment." (635 F.2d at 534-35). Citing *Whalen* and *Illinois v. Vitale*, 447 U.S. 410 (1980),⁵ the court in *Pandelli* observed that the Supreme Court had "modified the analysis and meaning tra-

⁵ In *Illinois v. Vitale*, 447 U.S. 410 (1980) this Court remanded the case for a determination whether under Illinois law proof of the offense of vehicular homicide always required proof of a careless failure to reduce speed, and noted that "if in the pending manslaughter prosecution, Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution. (447 U.S. at 421) Apparently there is some controversy concerning the meaning of this sentence. See *Thigpen v. Roberts*, 468 U.S. 27, 35-36 (1983) (Rehnquist, J., dissenting).

ditionally given *Blockburger*" and made clear that "the requisite statutory elements must be examined from the vantage point of the particular case before the court." (635 F.2d at 536). The court in *Pandelli* also pointed out that in applying *Blockburger* the reviewing court must now go further than an abstract analysis of the elements of the separate statutory provisions, and "look to the legal theory of the case or the elements of the specific criminal cause of action for which defendant was convicted without examining the facts in detail." (635 F.2d at 538).

The *Pandelli* court suggests that the elements of the offense must be viewed in the context of the indictment and the government's theory of the case. The court then went on to hold that in the context of the particular case before it the Mann Act violation and the Travel Act violation were the same offense because the government's theory of the Travel Act violation was that he "caused" the woman to travel with the intent to carry on prostitution, and concluded that the "defendant is effectively charged in both the Mann Act and the corresponding Travel Act counts with transporting a woman across State lines for purposes of prostitution," and that the "offenses therefore merge for purposes of the double jeopardy prohibition." (635 F.2d at 539).

6. Applying these principles to the instant case, petitioner suggests that we must look to the particular charges of the indictment and to the government's theory of the case. The substantive offenses are all alleged to be part of the conspiracy charged because each substantive offense is also alleged as an overt act. More importantly, however, as to petitioner and the other defendants named as aiders and abettors in the substantive counts, it is apparent that the government's theory of the case as to them is based upon vicarious liability under *Pinkerton*. (Vol. 55, p. 10). According to the government's theory

of this case, one of the "requisite statutory elements" of the charge of aiding and abetting in the substantive counts is the element of agreement under the *Pinkerton* theory. The element of agreement, which under the traditional *Blockburger* analysis would be the element *not* required for proof of the substantive offense, becomes, under the government's theory of this case, an *element* of the substantive offense as to the defendants named as aiders and abettors. Accordingly, it cannot be said, as to petitioner and the others prosecuted under the *Pinkerton* theory, that the charge of conspiracy requires proof of an element which the substantive offense did not. Under the *Pinkerton* theory, both the conspiracy and the substantive offense require proof of the conspiratorial agreement.

7. This conclusion is supported by the reasoning of the Court of Appeals for the Ninth Circuit in *United States v. Wylie*, 625 F.2d 1371 (9th Cir. 1980), where the court responded to the government's contention that the conspiracy and substantive provisions under the Comprehensive Drug Abuse Prevention and Control Act of 1970 were separate offenses under *Blockburger* because the conspiracy statute required proof of the additional element of an agreement. The court observed that "this distinction between the two offenses no longer holds true because of the *Pinkerton* instruction." (625 F.2d at 1381). And more directly to the point:

"Because this instruction was given, the conspiracy charge no longer required proof of an element that the distribution charge did not." (625 F.2d at 1381)

The court, however, rejected the double jeopardy claim because it found that "Congress did intend to allow consecutive sentences" for conspiracy and the substantive offenses, and therefore did not apply the *Blockburger* test, which should be applied only when the congressional intent is not apparent. (625 F.2d at 1382). However, neither

the *Wylie* court, nor any other court, has faced the question of congressional intent concerning *Pinkerton* vicarious liability. In a footnote, the court in *Wylie* noted that it found no cases which squarely faced and decided a question involving an interface between *Pinkerton* and *Blockburger*. However, the issues arising from the implicit conflict between *Pinkerton* and *Blockburger* are squarely presented by petitioner's case.

8. Petitioner's contention that certiorari should be granted is further supported by the observations of the Court of Appeals for the Fifth Circuit in *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979). In *Larkin*, the appellant also contended that his prosecution on charges of conspiracy and substantive offenses predicated on *Pinkerton* vicarious liability violated the Double Jeopardy Clause because the conspiracy was a lesser included offense of the *Pinkerton* vicarious liability offenses. Although the court of appeals found it unnecessary to resolve this issue because of the procedural posture of the case, the court of appeals found it "somewhat difficult to square *Pinkerton* with the double jeopardy cases discussed supra." (605 F.2d at 1367). The cases referred to were the Court's decisions in *Brown v. Ohio*, 432 U.S. 161 (1978), *Jeffers v. United States*, 432 U.S. 137 (1977), and *Harris v. Oklahoma*, 433 U.S. 682 (1977). Expanding upon its conclusion that it was difficult to reconcile these cases with *Pinkerton*, the court of appeals said:

"The most difficult task of reconciling these cases is presented by *Harris*, supra, for the relationship between its felony murder count and the underlying charge, robbery with firearms, seems to be quite analogous to the connection between a *Pinkerton* vicarious liability count and the underlying conspiracy charge. Just as the intent necessary to prove felony murder was provided by the robbery with firearms charge in *Harris*, see 433 U.S. at 682, 97 S.Ct. 2912,

the intent to establish Larkin's liability for the acts of his co-conspirator is supplied by the conspiracy charge. See *Pinkerton*, *supra*, 328 U.S. at 647, 66 S.Ct. 1180. Just as Harris's participation in a robbery created his liability for the shot of his partner, Larkin's formation of a conspiracy with Parker established Larkin's liability for Parker's embezzlement of union funds and falsification of union records. It would therefore appear that under *Harris*, the conspiracy charged against Larkin is a lesser included offense of the *Pinkerton* vicarious liability offenses, counts two through seven." (605 F.2d at 1367)

9. To be sure, as the court of appeals below observed, the *Pinkerton* decision itself held that the convictions for conspiracy and the substantive offenses did not violate the Double Jeopardy Clause, but this conclusion of the opinion is supported by no discussion and analysis whatsoever. In this context it is helpful to point out that the *Larkin* court concluded that there is much in the *Pinkerton* opinion to support the conclusion that the double jeopardy holding in *Pinkerton* related solely to the proposition that conspiracy to commit an act and the commission of that act are distinct crimes and therefore cumulative punishment may be imposed on the conspirator who also actually commits the substantive offense. (605 F.2d at 1367, fn. 19) The *Larkin* Court also refers to this Court's characterization of the *Pinkerton* holding in *Ianelli v. United States*, 420 U.S. 770, 777-78 (1975) (605 F.2d at 1367, fn. 19). Of course, it is not here contended that there is a double jeopardy violation where a conspirator actually commits a substantive offense, but only where the conviction for the substantive offense is based entirely on *Pinkerton* vicarious liability.

The court in *Larkin* went on to suggest that it was "unclear to what extent the double jeopardy language in *Pinkerton* applies to . . . vicarious liability situations."

(*Id.*) The court then suggested that in any event the double jeopardy reasoning of *Pinkerton* may need reexamining: “Moreover, *Harris, supra*, may necessitate a reexamination of *Pinkerton*’s double jeopardy reasoning.” (605 F.2d at 1367, fn. 19).

10. The court of appeals rejected petitioner’s argument on the grounds that the double jeopardy question had already been decided by *Pinkerton* and “we are bound by *Pinkerton*.” (App. A-11). However, in a footnote at the conclusion of its discussion of petitioner’s double jeopardy argument, the court expressed reservations about the imposition of consecutive sentences:

“Nevertheless, we are troubled by the multiple sentences for convictions which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also served as proof of the conspiracy. The district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences.” (App. A-13)

11. Whether viewed as a double jeopardy question or purely as a question of what Congress intended, the *Pinkerton* vicarious liability situation should be reexamined by this Court. To continue to rely upon the intent of Congress as to the particular substantive violation alleged to be the object of the conspiracy charged is to ignore the more basic question of Congressional intent—or the lack of it—concerning *Pinkerton* vicarious liability itself. To say that Congress intended cumulative punishments for substantive offenses actually committed is one thing; to say, however, that Congress also intended cumulative punishments for substantive offenses not actually committed but reached only through *Pinkerton* vicarious liability is quite another story.

This Court's decision in *Missouri v. Hunter*, 459 U.S. 359 (1983) suggests that the Legislature can never violate the Double Jeopardy Clause when prescribing multiple punishments, and that in the area of multiple punishment the Double Jeopardy Clause functions solely as a limitation on the authority of the courts. If this is true, that is all the more reason for granting certiorari in the instant case because the judge-made *Pinkerton* rule authorizes an expansive theory of criminal liability that permits the fragmentation of a single conspiracy into as many overt acts as can be alleged as violations of a substantive provision, limited only by the ingenuity and imagination of the prosecutor who prepares the indictment. In the present case, for example, there were 75 alleged overt acts. If all were alleged as substantive violations, petitioner could have received a sentence of between 150 and 425 years, without actually having committed any of the substantive offenses, either as a principal or aider and abettor, but based solely on his participation in the conspiracy.

The view that in the area of multiple punishments the words "the same offense" have no meaning independent of the legislature suggests at least that the collective sense of the elected representatives may impose some limit on how many offenses may be given cumulative punishment. If, however, the rule is to be that each overt act can subject a conspirator to an additional cumulative sentence, such a law should be passed by the legislature and not by the judiciary. Moreover, the adoption of the rule by the judiciary has the effect of passing the power and responsibility for determining how many offenses should be created out of a single conspiracy to a single individual—the prosecutor who, under the theory of the majority in *Missouri v. Hunter*, may no longer be subject to the limitations of "the same offense" concept of the Double Jeopardy Clause.

II.

THIS CASE PRESENTS THE QUESTION OF WHETHER THE *BOURJAILY* DECISION SHOULD BE APPLIED RETROACTIVELY.

When the petitioner's case was tried, the law in the Eighth Circuit and almost everywhere else was that, in ruling on the admissibility of co-conspirator statements against a particular member of the conspiracy, the district court could not consider the statements themselves but must make its determination on independent evidence of the particular individual's membership in the conspiracy. In other words, a particular defendant's membership must be established only by evidence of his own acts and declarations and not by the hearsay declarations of co-conspirators.

Several years before petitioner's trial, the Eighth Circuit considered and rejected the government's contention that under Rule 104 of the Federal Rules of Evidence, the district court could consider the co-conspirator statements themselves in determining a particular defendant's membership in the conspiracy. *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). In so holding, the Eighth Circuit said:

"It has been suggested that the New Federal Rules of Evidence have altered the requirement that the admissibility of a co-conspirator's statement be determined on the evidence exclusive of the statement itself. See, e.g., *United States v. Martorano*, 557 F.2d 1, 11-12 (1st Cir.) . . . We believe that the requirement of independent evidence is an important safeguard, however, and therefore adhere to our traditional rule. See *Glasser v. United States*, 315 U.S. 60, 74-75 . . ." (573 F.2d at 1044)

The *Glasser* rule of course was the classic statement that declarations of co-conspirators are admissible against

a particular defendant "only if there is proof aliunde that he is connected with the conspiracy. . . . Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U.S. at 74-75.

It was petitioner's contention both at trial and on appeal that the government had not shown by a preponderance of the independent evidence that petitioner was a member of the conspiracy charged and that therefore the co-conspirator "hearsay" statements should not have been admitted against him. As to petitioner's own acts and declarations, the evidence showed only that he had a few brief and innocuous telephone conversations with two members of the conspiracy and that he was seen a few times in the company of some of the alleged conspirators. However, neither the surveillances of association with alleged conspirators nor the brief conversations attributed to him were sufficient to show that he was a member of or knew anything about the alleged conspiracy. The conversations were all innocuous and of a social nature, and on few occasions when he was in the presence of alleged conspirators nothing incriminating occurred. Although it was the government's theory that petitioner received and delivered skimmed money, no one ever testified that they saw petitioner with money or with any package which supposedly contained money, and none of the conversations attributed to him concerned money or anything that could be interpreted as referring to money or any of the objects of the conspiracy.

On appeal to the Eighth Circuit, petitioner argued that, under the rule of *Glasser* and *Bell*, the evidence of his own acts and declarations did not establish by a preponderance of the evidence that petitioner was a member of the conspiracy, that the co-conspirator statements were erroneously admitted against him, and therefore his con-

viction should be reversed. (Supplemental Brief of Defendant-Appellant Angelo LaPietra, pp. 7-17)

The court of appeals never decided this question because of the intervening decision of this Court in *Bourjaily v. United States*, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) which was decided on June 23, 1987, after the court of appeals heard oral argument in this case on May 11, 1987. (This Court's opinion in *Bourjaily* was called to the court of appeals' attention by a letter dated June 24, 1987, from the Department of Justice.)

In an opinion filed October 8, 1987, the court of appeals summarily rejected petitioner's contentions in reliance upon the *Bourjaily* decision. (App. A-18) The court of appeals also noted in a footnote that:

"In addition, we observe that the Government produced direct evidence of the conspiracy and appellants' participation in it. Allen Glick and Angelo Lonardo testified to their personal knowledge of the appellants' activities." (App. A-18)

This statement is, as to petitioner, a complete misrepresentation. Although Allen Glick and Angelo Lonardo did testify to the alleged involvement of some of the defendants in the conspiracy, neither Glick nor Lonardo ever mentioned petitioner or referred to him in any way. The evidence showed that petitioner never met nor had any dealings with either Glick or Lonardo, and the statement that they provided "direct evidence" of petitioner's alleged activities is nowhere supported by the record.

This Court admitted in the *Bourjaily* opinion that in more than 10 years since the adoption of the Federal Rules of Evidence the courts of appeals had "widely adopted" the view that in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements them-

selves for their evidentiary value. (97 L.Ed.2d at 154). However, rejecting the settled practice of most circuits, this Court then went on to hold that the *Glasser* bootstrapping rule had not survived the 1975 adoption of the Federal Rules of Evidence.

The decision in *Bourjaily* surely constitutes a clear and explicit break with past authority which calls for retroactivity analysis. Moreover, since *Bourjaily* does not involve a new constitutional rule, this Court is not bound by the rejection of the “clear break” rule in *Griffith v. Kentucky*, 479 U.S. ___, 93 L.Ed.2d 649 (1987), and should consider the “. . . reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule,” which “have virtually compelled a finding of non-retroactivity.” *United States v. Johnson*, 457 U.S. 537, 549-50 (1982). In the instant case we have reliance not only by law enforcement authorities, but by the trial court and petitioner as well. The unfairness to petitioner of a retroactive application is obvious, as is the windfall benefit to the government in this particular case.

In addition, the Court’s interpretation of Rule 104 is part of its rule-making function and new rules should of course apply only prospectively. Although the Court in *Bourjaily* points out that the Federal Rules of Evidence were adopted in 1975, there can be little question that the *Bourjaily* decision announced a “new rule” for conspiracy trials.

Petitioner respectfully submits that it is unfair to retroactively apply this sudden change in well-settled principles of the law of conspiracy to petitioner’s case which was both tried and appealed on the basis of the prior law. Although this question will affect only a limited number of cases for a short period of time, we nevertheless sub-

mit that it is appropriate for the Court to grant certiorari and summarily remand the case to the court of appeals for reconsideration under the law as it existed prior to *Bourjaily*.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this petition for a writ of certiorari be granted. Petitioner LaPietra also requests that points raised by co-defendants, John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo and Milton Rockman in their petitions for a writ of certiorari arising from this same proceeding be incorporated herein insofar as this Court may determine those points to be applicable to petitioner LaPietra.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 86-1439

United States of America,

Appellee,

v.

John Peter Cerone,

Appellant.

No. 86-1440

United States of America,

Appellee,

v.

Milton John Rockman,

Appellant.

No. 86-1441

United States of America,

Appellee,

v.

Joseph John Aiuppa,

Appellant.

No. 86-1442

United States of America,

Appellee,

v.

Angelo LaPietra,

Appellant.

No. 86-1443

United States of America,

Appellee,

v.

Joseph Lombardo,

Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: May 11, 1987
Filed: October 8, 1987

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge,
and FAGG, Circuit Judge.

BRIGHT, Senior Circuit Judge.

John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, Angelo LaPietra and Milton John Rockman appeal their convictions for conspiracy to travel in interstate commerce and use interstate facilities with the intent to promote and carry on an illegal activity in violation of the Travel Act, 18 U.S.C. §§ 371, 1952, and on seven substantive Travel Act violations. The appellants raise nineteen allegations of error, some collectively, others individually. For the reasons discussed below, we affirm the convictions.

I. BACKGROUND

The indictment charged that the defendants and several unindicted co-conspirators sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and Fremont, in violation of Nevada gaming laws. These casinos were owned by the Argent

Corporation which, in turn, was owned by Allen R. Glick. Glick's purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators obtained control of Argent Corporation by helping Glick to obtain financing and by placing two of their people, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control of the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund along with Roy Williams, a Teamsters official.

The Government charged that the conspirators were able to control Argent and the Union because they were members of organized crime "groups" in various Midwestern cities. Aiuppa was the boss of the Chicago group, with Cerone as its underboss. LaPietra and Lombardo were members of the Chicago group, and Rockman was an associate of the Cleveland group.¹

At trial, the Government introduced the testimony of Glick, Angelo Lonardo, a Cleveland underboss, Roy Williams and Carl Thomas, among others. The Government also produced evidence consisting of tape recordings, notes made by DeLuna, and surveillance testimony by FBI agents.

According to the Government's theory of the case, in early 1974, Frank Balistrieri agreed to help Allen Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Nick Civella and Milton Rockman, who each controlled a trustee of the pension fund. Glick then received his loan.

After Glick bought the casinos, Balistrieri and the others required Glick to promote Frank Rosenthal to a management position at Argent. Rosenthal supervised the skim-

¹ Co-conspirator Nick Civella headed the Kansas City group, and co-conspirator Frank Balistrieri was the head of the Milwaukee group.

ming of gambling proceeds from the casinos. Later, Carl Thomas was placed in charge of the operation for a short time.

Initially, the Kansas City, Milwaukee and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose between the groups, and the Chicago group stepped in to resolve the problem. Thereafter, the Chicago group, including appellants Aiuppa, Cerone, Lombardo and LaPietra shared the skimming proceeds.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. LaPietra became DeLuna's contact with the Chicago group after the death of a previous contact. Appellant Rockman also acted as a contact with DeLuna for the Cleveland group, and as an intermediary with the Chicago group.

Typically, the skimmed money was delivered from Las Vegas to Chicago. LaPietra delivered the skimmed money to Anthony Chiavola, Sr. of Chicago who, in turn, delivered the skimmed money to DeLuna for the Kansas City group and gave the Cleveland group's share to appellant Rockman.

During the period 1976 to 1979, Rosenthal had various widely publicized problems with the Nevada licensing authorities, who considered him to be unsuitable for working as a key employee of a casino. The conspirators were concerned that Rosenthal's problems might jeopardize their interests in Las Vegas casinos and in the skimming operations, and they had numerous conversations about replacing Rosenthal. During the same period, the conspirators also had problems with Allen Glick who was reluctant to accept their control of Argent through Rosenthal. Nick Civella and Carl DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal's direction. Glick yielded to their demands.

In October 1977, independent investment managers took over management of the pension fund's assets, which hindered the conspirators' ability to control the pension fund, to obtain loans and receive other favorable treatment. Thereafter, the conspirators, principally appellant Lombardo and Allen Dorfman, had numerous strategy discussions concerning their efforts to replace the independent managers and other individuals with persons controlled by the conspirators. From 1979 to 1981, the conspirators, including appellants Aiuppa, Cerone, Lombardo and Rockman, took measures to support Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later to support Jackie Presser to succeed Williams in order to maintain the conspirators' influence with the Teamsters Union.

In 1978, DeLuna told Allen Glick that his "partners" were "sick of" dealing with him and that they would kill him unless he sold Argent Corporation. Thereafter, Glick publicly announced his intention to sell Argent and three groups began to negotiate with Glick to buy Argent. In December 1979, Glick sold Argent to Trans-Sterling, Inc.

From March 1978 to May 1980, law enforcement officials conducted many court authorized electronic surveillances of various telephones and locations in Kansas City, Missouri; Leavenworth, Kansas; Las Vegas, Nevada; Chicago, Illinois; and Milwaukee, Wisconsin, including the residences of Carl DeLuna, Anthony Civella, Joe Agosto, and Anthony Chiavola, Sr., and the business offices of Allen Dorfman. Lombardo, Rockman and LaPietra were intercepted during the electronic surveillances.

Law enforcement officials also conducted various court authorized searches and seizures of records and documents. For example, on February 14, 1979, officials seized address and phone books, papers, and other documents from Carl DeLuna's home in Kansas City, Missouri, which contained DeLuna's notes of meetings and telephone conversations among the conspirators, telephone numbers and disbursement of funds in connection with the skimming operation (hereinafter "the DeLuna notes").

On September 30, 1983, a grand jury in Kansas City, Missouri, returned an eight-count indictment against fifteen defendants, charging them with violations of 18 U.S.C. §§ 2, 371, 1952. Carl Civella, Peter Tamburello, Anthony Chiavola, Sr. and Anthony Chiavola, Jr. entered guilty pleas prior to trial. The district court² severed the case of Anthony Spilotro from the others, and he died several months after trial. Carl DeLuna and Frank Balistreri pled guilty during trial. The court dismissed the indictment against Carl Thomas during trial, and he then testified as a government witness. After the close of the government's case, the court entered judgments of acquittal as to John and Joseph Balistreri.

After a four-month trial, the jury returned guilty verdicts on all counts against the remaining defendants, Aiuppa, Cerone, Lombardo, LaPietra and Rockman. Aiuppa and Cerone were sentenced to consecutive prison terms totalling twenty and one-half years. Lombardo and LaPietra received consecutive sentences totalling sixteen years imprisonment. Rockman also received consecutive sentences, totalling twenty-four years. Each defendant was fined \$80,000.

II. DISCUSSION

A. Sufficiency of the Evidence on Count I

All five appellants contend that the evidence was insufficient to convict them on Count I, conspiracy to maintain an undisclosed interest in the gaming interests of Allen Glick. They argue that the evidence failed to show their maintenance of a hidden interest. Rather, at most, the evidence showed a common purpose to skim money by extortion, embezzlement or theft. Some of the defendants contend that the evidence showed that they were merely collecting a "finder's fee" for their assistance to Glick in obtaining his pension fund loan.

² The Honorable Joseph E. Stevens, Jr., United States district Judge for the Eastern and Western Districts of Missouri.

When reviewing the sufficiency of the evidence for a criminal conviction, we must view the evidence in the light most favorable to the jury's verdict. *United States v. Randle*, 815 F.2d 505, 508 (8th Cir. 1987); *United States v. Roenigk*, 810 F.2d 809, 813 (8th Cir. 1987). So viewed, we determine that the evidence was sufficient to convict the appellants on count I as charged in the indictment.

Uncontradicted evidence showed that Frank Rosenthal obtained a managerial position with Argent, that he directed the skimming operation at the casinos and that he acted at the direction and for the benefit of the conspirators. Frank Balistrieri, Nick Civella and Rockman obtained this influence over Argent by arranging for Glick to receive the pension fund loan. All the appellants shared in the skimming proceeds and discussed the working of the operation among themselves. As this court held in *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), indirect receipt of gambling moneys without the necessary licenses and in violation of state law constitutes a violation of the Travel Act. 763 F.2d at 907. Furthermore, we note that the indictment here is nearly identical to that charged in the *DeLuna* case.³ We are bound by *DeLuna's* holding that evidence of the receipt of skimmed moneys from a Nevada casino serves as a sufficient basis to sustain the convictions under the Travel Act indictment. *Id.* at 906-07.

We also reject appellants' argument that a variance in proof existed from what was charged in the indictment. As discussed above, sufficient evidence existed to support the convictions as charged in the indictment. Furthermore, appellants can show no prejudice from any alleged variance. Prior to trial, several co-defendants challenged the indictment, claiming that the charges were the same as those on which they had previously been convicted in the so-called Tropicana case, *United States v. DeLuna*, *supra*. In response, the Government submitted a detailed offer

³ *DeLuna* involved skimming from another Las Vegas casino, the Tropicana.

of proof as to what it expected to prove in this case. *United States v. Thomas*, 759 F.2d 659, 664-65 (8th Cir. 1985). With this sort of information, appellants can claim no prejudice or surprise from the evidence presented at trial.

B. *Pinkerton* Instruction

The appellants were indicted as aiders and abettors on seven substantive counts of violating the Travel Act. The court instructed the jury on theories of aiding and abetting, as well as vicarious liability under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946).⁴ Appellants argue that the district court erred in submitting both theories to the jury. They contend that the evidence was insufficient to convict them of aiding and abetting. Consequently, the jury must have found them guilty by reason of vicarious liability. This, they claim, is improper because they cannot be convicted as principals under vicarious liability when they were indicted as accessories under an aiding and abetting theory.

Even assuming that the evidence failed to prove aiding and abetting, we do not agree with appellants' argument. Other circuits have held that persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* instruction. *United States v. Meister*, 762 F.2d 867, 878 (11th Cir.), *cert. denied*, 106 S. Ct. 579 (1985); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Although appellants' argument may have some logical appeal, clearly the law fails to support their position.

⁴ Under *Pinkerton*, a party to a continuing conspiracy may be responsible for substantive offenses in furtherance of the conspiracy even though that party does not participate or know of the substantive offenses.

C. Double Jeopardy

Appellants claim that their convictions for conspiracy and for substantive acts taken in furtherance of the conspiracy under a theory of vicarious liability violate the Double Jeopardy Clause of the Constitution.

It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy. *Albernaz v. United States*, 450 U.S. 333, 344-45 n. 3 (1981); *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975). That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant. Rather, the focus must be on the offenses and whether each offense requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see also *Albernaz*, 450 U.S. at 337-39; *Whalen v. United States*, 445 U.S. 684, 691-93 (1980).

The elements of criminal conspiracy (count I) are: (1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants. *United States v. Raymond*, 793 F.2d 928, 931-32 & n. 3 (8th Cir. 1986).⁵

Counts II through VIII allege violations of 18 U.S.C. §§ 2, 1952, the elements of which are: (1) aiding and abetting; (2) the interstate travel or use of interstate facilities; (3) with intent; (4) to promote or manage an unlawful activity; and (5) the actual or attempted promotion or management of the unlawful activity. 18 U.S.C. §§ 2, 1952.⁶

⁵ Count I alleged that appellants conspired to use interstate facilities to carry on the unlawful activity of maintaining an interest in the gambling operations of Allen Glick and indirectly receiving gambling proceeds without being licensed in violation of Nevada gaming laws. Appellants obtained this interest through their control of the Teamsters Union Pension Fund.

⁶ Count II alleged that appellants aided and abetted Anthony Chivola, Sr. on October 7, 1978 to travel and distribute unlawful gambling proceeds.

(Footnote continued on following page)

Upon analyzing the elements of the offenses, it is apparent that conspiracy includes an element that the substantive offense does not; namely, an agreement. Appellants, however, argue that the convictions violate the Double Jeopardy Clause because (1) under the *Pinkerton* theory of liability, conspiracy is an element of the substantive offenses, and (2) aiding and abetting requires or at least implies an agreement. Thus, under either of these arguments, double jeopardy is violated because each offense requires identical elements to be proven.

We cannot accept appellants' first argument. *Pinkerton* itself disposed of their argument. The Court there held that convictions for conspiracy and substantive acts committed in furtherance of the conspiracy do not violate the Double Jeopardy Clause, even though the substantive con-

⁶ *continued*

Count III alleged that appellants aided and abetted Anthony Chiavola, Sr. on December 21, 1978 to make arrangements via telephone for meeting to discuss their interests in the gambling operation.

Count IV alleged that appellants aided and abetted Carl Thomas on November 13, 1978 to discuss by telephone with Nick Civella the operation of the unlawful gambling activity.

Count V alleged that appellants aided and abetted Carl DeLuna on November 16, 1978 to telephone and discuss a proposed change of ownership of Glick's casino with Joseph Agosto and the continuing receipt of unlawful gambling proceeds.

Count VI alleged that appellants aided and abetted Carl DeLuna on November 20, 1978 to telephone Joseph Agosto and discuss the unlawful skimming operation.

Count VII alleged that on January 11, 1978, John Cerone travelled to Kansas City to meet with Carl Civella, Carl DeLuna and Nick Civella to discuss the sale of Glick's casinos and their continuing skimming operation, and that the other appellants aided and abetted this act.

Count VIII alleged that appellants aided and abetted Carl DeLuna on January 16, 1979 to telephone Joseph Agosto and discuss a message to Joseph Aiuppa, the visit of John Cerone, Glick's casinos and the unlawful skimming operation.

viction was obtained solely by means of participation in the conspiracy. *Pinkerton*, 328 U.S. at 646-47. We are bound by *Pinkerton*.

Appellants' second argument in this regard is somewhat more difficult. They contend that the substantive offenses also require proof of an agreement because aiding and abetting implies that at least two people are involved and agree to be involved.⁷ Thus, the substantive offenses and the conspiracy count require the same elements to be proven.

However, as the Supreme Court noted in *Iannelli*, agreement remains the essential element of (conspiracy) crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact. 420 U.S. at 777, n.10.

Appellants are essentially advancing the application of Wharton's Rule, which requires merger of the substantive offense and the conspiracy when the substantive crime requires two or more persons for its commission. *Iannelli v. United States*, 420 U.S. 770, 773 & n. 5 (1975). The Rule itself does not rest on double jeopardy principles. *Id.* at 782. The Supreme Court has determined that Wharton's Rule is merely an aid in determining whether Congress intended to create separate offenses. *Id.* at 786. The Court noted that the crimes to which Wharton's Rule classically applied have three general characteristics: (1) general congruence of the agreement and the substantive offense; (2) the parties to the agreement are the only ones who commit the substantive offenses; and (3) the consequences of the substantive crime rest on the parties rather than society while the conspiracy does not pose the threats to society that the law of conspiracy seeks to avoid. *Id.* at 782-83.

⁷ Except for count II, the substantive offenses by themselves require two or more individuals to act together and thus imply an agreement.

Using these factors and examining legislative intent, the *Iannelli* Court analyzed a closely analogous offense to that charged here, 18 U.S.C. § 1955. The Court determined that Wharton's Rule does not apply to section 1955. Furthermore, the legislative intent behind the Organized Crime Control Act of 1970, of which section 1955 is a part, demonstrates a clear legislative judgment to punish conspiracy and the substantive offense as separate crimes. *Id.* at 791.

Applying these considerations to the present case, it is clear that Wharton's Rule does not operate to merge the conspiracy and the substantive offenses. Although the parties to the agreement are the same as those committing the substantive crimes, the conspiracy and substantive offenses are not generally congruent. The conspiracy contemplates a scheme much greater in scope than that encompassed by the substantive offenses. Furthermore, the consequences of the substantive crimes do not rest solely on the parties, rather society at large is affected.

Most importantly, the legislative history underlying the Travel Act indicates that Congress did not intent conspiracy to merge with aiding and abetting a Travel Act offense. The Travel Act was enacted to provide federal assistance in the prosecution of organized crime. H.R. Rep. No. 966, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2665. Congress specifically intended that the Travel Act be prosecuted in conjunction with the aiding and abetting statute so that those who directed others to carry out their illegal missions could be prosecuted. H.R. Rep. No. 966, 87th Cong., 1st Sess. 3, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2666. In addition, conspiracy was proposed as an element of section 1952, but was rejected. 107 Cong. Rec. 13,943 (1961). Accordingly, we believe Congress intended that aiding and abetting a Travel Act offense be a separate offense from conspiracy, and double jeopardy principles are not violated by a prosecution for both offenses.

Thus, under either theory presented by appellants, the Double Jeopardy Clause has not been violated.⁸

D. Jury Instruction

Appellants argue that the district court erroneously instructed the jury on intent. Specifically, they contend that the following instructions are erroneous:

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made or done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Jury Instruction No. 74; and

It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

Jury Instruction No. 76.

Appellants contend that these instructions impermissibly shifter the burden of proof from the Government to the

⁸ Nevertheless, we are troubled by the multiple sentences for convictions which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also serve as proof of the conspiracy. The district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences.

defendants and thus violated their due process rights. We do not agree.

First, Instruction No. 74 merely instructs the jury that it may find that a person intends the natural and probable consequences of his knowingly done acts. The creation of this inference does not necessarily violate due process. *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *see also Sandstrom v. Montana*, 442 U.S. 510, 515 (1979). The challenged instruction violates due process only if "the conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.*

Applying this standard to the present case, it is clear that Instruction No. 74 does not relieve the Government of its burden to prove intent. Rather, it allows the jury to make an inference as to intent. Furthermore, the instruction immediately reminds the jury that the inference is merely permissive and that "it is entirely up to [the jury] to decide what facts to find from the evidence." Accordingly, Instruction No. 74 does not violate appellants' due process rights.

Instruction No. 76 presents a more difficult issue. Appellants contend that because the Travel Act offenses are specific intent crimes, the district court erred when it instructed the jury that every person is presumed to know the law.

Although we agree with appellants that the substantive Travel Act offenses are specific intent crimes, it does not follow that the challenged instruction is erroneous. The Government need not show that appellants knew that a law existed to penalize their conduct. *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir. 1986). Sometimes, however, a specific intent crime requires that the defendant have knowledge of a legal requirement. *Id.*

In this case, appellants present a difficult issue. Knowledge of the licensing requirements under Nevada law would appear to be required for the Travel Act offenses. Instruction No. 76, however, seems to negate the Government's burden of proof in this regard.

Assuming that this instruction is erroneous, we must examine the record to determine whether such an error is harmless. *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986). Reviewing the record as a whole, we cannot say that the appellants received an unfair trial or that this error affected the composition of the record. The challenged instruction did not create a conclusive presumption, and another instruction advised the jury that the Government had to prove that appellants "knowingly did an act which the law forbids, purposely intending to violate the law." Jury Instruction No. 73. Moreover, the Government adduces ample evidence for the jury to find specific intent. Thus, in light of the record as a whole, any error in the jury instruction that may have introduced a confusing element as to the Government's burden of proving specific intent amounts to harmless error in this case.

E. Disclosure of Informants

Appellants argue that they were deprived of a fair trial because the district court refused to disclose the identity of two confidential informants. Prior to trial, the appellants asked for the identity of the informants and any statements they made, stating that such information "may be relevant and helpful to the defense."

The district court examined various statements and reports *in camera* and also interviewed one of the confidential informants. The court found that one informant did not convey any information to the FBI that was relevant or helpful to the defense. The other informant conveyed information that was used by the FBI to establish probable cause for court-ordered surveillance. The court concluded that disclosure was not required in light of the circumstances of this case, the need for the informants' safety and the information they conveyed.

The district court did not abuse its discretion by refusing to disclose the identity of the confidential informants. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court stated the governing test for disclosure.

When disclosure of an informant's identity would be material and helpful, the public interest in protecting the flow of information is overcome. *Id.* at 60-62. The defendant has the burden of showing materiality. *United States v. Grisham*, 748 F.2d 460, 463-64 (8th Cir. 1984). Because such a showing may be difficult, the district court may hold an *in camera* proceeding to determine materiality. *Id.* at 464.

In the present case, the appellants only speculated that the confidential informants could provide them with relevant and helpful information. Nonetheless, the district court examined the confidential information *in camera* and concluded that disclosure was not warranted. In reaching its conclusion, the court correctly applied the *Roviaro* test and looked to the circumstances of the case. Accordingly, the district court did not abuse its discretion when it refused to order disclosure of the informants' identity.⁹

We are troubled, however, by the Government's admission on appeal that one of the informants actually testified at trial. This admission apparently came as a surprise to the appellants. The Government, however, has indicated that it informed the appellants at trial that one of the witnesses was a confidential informant.

This incident does not warrant reversal of appellants' convictions. The Government provided all the necessary information to defendants prior to the witness' testimony, and the defendants conducted a thorough cross-examination. Appellants have demonstrated no prejudice from the Government's later use of an undisclosed confidential informant as a witness. Accordingly, the district court's refusal to disclose the informant's identity and the Gov-

⁹ In addition, other relevant factors relating to the safety of the witnesses cautioned against disclosure. In 1982, Frank Rosenthal's car was bombed. In 1983, Allen Dorfman was shot and killed. In 1986, the bodies of co-defendant Anthony Spilotro and his brother were discovered in an Indiana cornfield. In light of the physical danger of the informants and the lack of materiality, the court's decision reflects an appropriate balancing of interests.

ernment's subsequent disclosure that one of the informants testified does not constitute any reversible error.

Admission of Uncharged Crimes

Appellants argue that in numerous instances the district court erroneously admitted evidence of "other bad acts." Among other things, appellants challenge the admission of the statement that Allen Dorfman "was shot dead on the street," and prosecution's presentation of testimony by Angelo Lonardo, Ken Eto, Roy Williams and Aladena Fratianno. In this argument, the defendants also allege error in the introduction of the DeLuna Notes that were also admitted at the prior Tropicana trial.

These contentions lack merit. Appellant Lombardo's counsel elicited the statement about Dorfman and no objection was made. Improper testimony by Lonardo was stricken from the record, and the court properly instructed the jury to disregard Lonardo's improper responses. The testimony of Williams, Eto and Fratianno did not implicate appellants in other crimes. Although the DeLuna notes were admitted in another trial to prove a different conspiracy, the notes admitted in the present case were relevant to prove the conspiracy charged. There is nothing impermissible in using the same evidence to prove two separate crimes. Evidence that is probative of the crime charged and not relevant solely to uncharged crimes is not "other crimes" evidence. *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir. 1985). We determine that the district court committed no error as to the challenged evidence.

G. Admission of Co-Conspirator Statements

All the appellants argue that insufficient evidence independent of co-conspirator statements existed and thus the co-conspirator statements, including the DeLuna notes, should not have been admitted. Without these statements, appellants argue that insufficient evidence exists to support their convictions.

We note that the admissibility of co-conspirator statements is determined by the trial judge and he may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted. *Bourjaily v. United States*, 107 S. Ct. 2775, 2780-82 (1987). Furthermore, the trial court need only determine that a conspiracy existed and that a defendant participated in it. The court is not required to independently inquire into the reliability of the co-conspirator statement. *Id.* at 2782-83.

Accordingly, appellants' argument that the co-conspirator statements should not have been admitted because no independent evidence existed to show a conspiracy, and their participation in it, must be rejected.¹⁰ Thus, the evidence, when viewed in the light most favorable to the Government, is sufficient to support appellants' convictions.

H. Admission of DeLuna Notes

Appellant Aiuppa argues that the DeLuna notes were improperly admitted against him. He claims that the notes were not properly authenticated, were not in furtherance of the conspiracy, insufficient independent evidence connected him to the conspiracy, and the notes' admission violated his sixth amendment confrontation rights.

As noted above, *Bourjaily v. United States*, *supra*, disposes of several of Aiuppa's arguments. It is not necessary that solely independent evidence connect Aiuppa to the conspiracy. Rather, the notes themselves may aid in the connection. 107 S. Ct. at 2782. Nor does their admission violate Aiuppa's confrontation rights. Because the notes were admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), *DeLuna*, 763 F.2d at 909, Aiuppa's confrontation rights were not violated. The re-

¹⁰ In addition, we observe that the Government produced direct evidence of the conspiracy and appellants' participation in it. Allen Glick and Angelo Lonardo testified to their personal knowledge of the appellants' activities.

quirements for admission under the Federal Rules of Evidence are essentially the same as the confrontation clause requirements. *Bourjaily*, 107 S. Ct. at 2782.

In addition, the evidence shows authentication of the DeLuna notes. An analysis of the notes seized in a search of DeLuna's home revealed that DeLuna had written the notes. The notes carried DeLuna's fingerprints. Thus, the notes were properly authenticated as declarations of a co-conspirator. See *DeLuna*, 763 F.2d at 908-09; *United States v. Helmel*, 769 F.2d 1306, 1312 (8th Cir. 1985). The notes were also in furtherance of the conspiracy. They documented numerous meetings among the conspirators and other events, which were corroborated by surveillance and testimony of several witnesses. Accordingly, the district court committed no error in admitting the DeLuna notes.

I. Voice Identification

Appellant LaPietra argues that the Government failed to adequately identify his voice in several tape recorded phone calls and accordingly, those tapes may not be used to connect him with the conspiracy.

The district court did not err when it allowed the identification of LaPietra's voice. FBI Agent Thomeczek testified as to his supervision of the recordings and that he listened to all tapes used as exhibits. He also spoke with LaPietra several times after the indictment was issued and testified that the voice in question was that of LaPietra.

Any person may identify a speaker's voice if he has heard the voice at any time. *United States v. Smith*, 635 F.2d 716, 719 (8th Cir. 1980); *United States v. Vitale*, 549 F.2d 71, 73 (8th Cir.), cert. denied, 431 U.S. 907 (1977) (per curiam). Minimal familiarity is sufficient for admissibility purposes. Attacks on the accuracy of the identification go to the weight of the evidence, and the issue is for the jury to decide. *Smith*, 635 F.2d at 719; *Vitale*, 549 F.2d at 73.

Accordingly, the district court did not abuse its discretion when it admitted the identification of LaPietra's voice into evidence.¹¹

J. Withdrawal of Overt Act 51 From Jury Consideration

LaPietra also contends that the district court erred when it instructed the jury to disregard overt act 51. At trial, it was admitted that LaPietra's voice was misidentified in the phone call constituting overt act 51. LaPietra argues that the court's instruction prevented the jury from considering exculpatory evidence because the misidentification was helpful to his defense.

We cannot agree with LaPietra's contention. The court did not instruct the jury to disregard evidence of misidentification. Rather, the court instructed the jury to consider LaPietra's defense of voice misidentification and to determine whether the identification was reliable under the circumstances. Jury Instruction No. 92. Accordingly, the court did not deprive LaPietra of his defense.

K. Conspiracy Instruction

Appellant Cerone argues that the district court erroneously instructed the jury that the defendants were guilty of conspiracy if they aided and abetted a substantive count. Alternatively, Lombardo contends that the district court erred by failing to limit the aiding and abetting instructions to the substantive counts.

Upon examining the jury instructions, we determine that appellants' arguments are without merit. The court correctly instructed the jury on the elements of conspiracy. The court then explained the three essential ele-

¹¹ LaPietra also argues that the evidence failed to show that he drove a car under surveillance on August 16, 1978. This argument is irrelevant because LaPietra was not charged with driving the car. The only relevant event for that date was a meeting among several co-conspirators, one of whom was LaPietra.

ments of the Travel Act so that the jury could consider the objects of the conspiracy. The aiding and abetting language refers to the substantive Travel Act offenses, not conspiracy. Furthermore, the court clearly instructed the jury that the "gist of the offense" was an agreement. Accordingly, the district court did not commit prejudicial error in its conspiracy instructions.

L. Cerone's Conviction on Count VII

Appellant Cerone argues that the evidence fails to prove that he traveled from Chicago to Kansas City for illegal purposes as alleged in count VII of the indictment. He contends that, at most, the evidence showed he traveled from Kansas City to Chicago. Because the evidence failed to support the offense charged in the indictment, Cerone argues that his conviction must be reversed.

Viewed in the light most favorable to the Government, the evidence showed that Cerone lived in Chicago and was observed leaving Kansas City on January 11, 1979 and arriving at the Chicago airport later that day. Earlier the same day, FBI agents observed Carl DeLuna pick up two unidentified men at the Kansas City airport. They later arrived at Anthony Civella's residence. DeLuna later drove Cerone to the airport in the same car observed earlier. In addition, a DeLuna note recorded that DeLuna met with Cerone and Civella on January 11, 1979 to discuss negotiations to buy Argent. Thus, although no direct evidence established the Chicago to Kansas City flight, the circumstances would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation. Accordingly, a reasonable jury could convict Cerone on count VII, and we sustain his conviction.

M. Identity of LaPietra's Code Name

LaPietra argues that the district court erred when it allowed FBI Agent Ouseley to testify as an expert wit-

ness and identify LaPietra as having the code name "Pitsacuni." He contends that Ouseley was not sufficiently qualified as an expert and that the evidence failed to support Ouseley's conclusion that LaPietra was "Pitsacuni."¹²

A witness may testify as an expert if the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue * * * ." Fed. R. Evid. 702; *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 728 (8th Cir. 1985). The trial court's determination of whether a witness qualifies as an expert will not be reversed absent an abuse of discretion. *Federal Crop Ins.*, 765 F.2d at 728; *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1254 (8th Cir. 1985). A witness may be qualified as an expert based on practical experience. *Circle J Dairy, Inc. v. A. O. Smith Harvestore Prods.*, 790 F.2d 694, 700 (8th Cir. 1986); *Federal Crop Ins.*, 765 F.2d at 728.

Agent Ouseley testified that he had been an FBI agent for twenty-five years, had attended training schools, and had previously testified twelve times as an expert on the use of codes. In these circumstances, the district court did not abuse its discretion in allowing Ouseley to testify as an expert.

LaPietra's argument that the evidence did not support Ouseley's conclusion that Pitsacuni was LaPietra's code name speaks to the weight of Ouseley's opinion, not its admissibility. He was thoroughly cross-examined about the evidence upon which he based his opinion. Furthermore, the district court instructed the jury that expert testimony should be considered just like any other testimony and be given whatever weight the jury finds appropriate in light of the expert's qualifications and all the other evidence. Accordingly, we reject LaPietra's claim.

¹² LaPietra also asserts that the identification is based entirely on co-conspirator hearsay statements and that he is shown to be a member of the conspiracy through these same hearsay statements. As noted above, the trial court may consider hearsay statements in making preliminary determinations concerning admissibility of evidence. *Bourjaily*, 107 S. Ct. at 2780. Accordingly, LaPietra's argument in this regard is without merit.

N. Sufficiency of Travel Act Indictment

Appellant Lombardo alleges that the substantive counts of the Travel Act in the indictment fail to specify the particular acts that the defendants did in furtherance of illegal activity.

We reject Lombardo's contention. Generally, an indictment is sufficient if it sets forth the offense in the statutory language, provided that the statute sets out the necessary elements of the offense. *United States v. McKnight*, 799 F.2d 443, 445 (8th Cir. 1986). Nonetheless, the defendant is entitled to a short, concise statement of facts constituting the offense charged, but he is not entitled to know the evidentiary details with which the government intends to convict him. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986); *McKnight*, 799 F.2d at 445. In the present case, the indictments contained lengthy statements of fact, and Lombardo clearly cannot claim inadequate notice of the acts with which he was charged. See *supra*, notes 6-7.

O. District Court's Admonition to Lombardo's Attorney

Lombardo argues that he was unfairly prejudiced by the district court's admonition to his attorney, Mr. Oliver, in the presence of the jury. During cross-examination, FBI Agent Palmer testified that he had observed Lombardo driving a red and white vehicle and that he learned the car was registered to Lombardo. Mr. Oliver then asked Palmer "would it surprise you to learn [Lombardo] had never owned a red and white car?" The court then asked Mr. Oliver if he, as an officer of the court, could prove his statement because no evidence of Lombardo's lack of ownership had been entered on the record. The court informed Mr. Oliver that if he could not prove his representation, he would be disbarred and held in contempt. Lombardo contends that this exchange prejudiced him and affected the jury's verdict.

We do not agree. At the next court session, the court gave the jury a curative instruction, stating that the de-

fendant was presumed innocent, was not required to produce evidence, and that the Government carried the burden of proof. The court's instruction served to correct any misunderstanding the jury may have had from the court's prior admonition to Mr. Oliver. Furthermore, the fact in issue, ownership and/or color of Lombardo's car, was not a critical issue. Although the admonition should not have been made in the presence of the jury, these remarks by the court cannot be deemed prejudicial error.

P. Appellant Rockman's Claims¹³

Rockman argues that the district court erred when it ruled on the admissibility of co-conspirator hearsay statements at the close of the Government's case and not at the end of all the evidence. Thus, he contends, statements and acts that occurred after the conspiracy had ended were erroneously admitted.

Rockman's argument alleges that the district court failed to follow the procedures mandated by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). He contends that because *Bell* requires the court to rule on the admissibility of co-conspirator hearsay statements at the close of all the evidence, the district court prejudiced his ability to present his defense when it made its ruling at the close of the Government's case. Rockman contends that the court's premature ruling caused it to exclude testimony of Shannon Bybee, a Government witness, who was called by Rockman to testify that Glick had no gaming interests after 1979. Rockman argues that this evidence was crucial because the indictment charged that the illegal objective of the conspiracy was to maintain a hidden interest in the gaming interests of Allen Glick. Because Glick held no

¹³ We address Rockman's claims as presented in his substituted supplemental brief. His original brief raised different issues which, although we do not discuss, lack merit. Although this substituted brief raised new issues after the initial briefing, we permitted its filing because of the extraordinary circumstances causing counsel's substitution and in the interest of fairness.

gaming interests after 1979, the district court erred in admitting co-conspirator acts and statements that occurred after 1979.

Initially, we note that it is not per se reversible error for the district court to make *Bell* findings at the close of the Government's case. *United States v. Legato*, 682 F.2d 180, 183 (8th Cir.), *cert. denied*, 459 U.S. 1091 (1982). Rather, we must determine whether Rockman suffered any prejudice from the court's action. *Id.*

Rockman contends that he was prejudiced because he could not establish that the conspiracy ended in 1979 and thus prove subsequent statements inadmissible. Although we are troubled by the district court's exclusion of Mr. Bybee's testimony on Rockman's behalf, we cannot say that the court's action rises to reversible error. In essence, Rockman is alleging prejudice because the evidence varied impermissibly from the indictment. The indictment charged that the conspiracy lasted until 1983. Rockman argues that because the illegal objective was a hidden interest in Glick's gaming interests, the conspiracy ended in 1979 with Glick's sale of his casinos.

As a variance argument, Rockman's challenge is without merit. He had ample and obvious notice that the Government was attempting to prove a conspiracy that endured until 1983. Furthermore, the jury knew of Glick's 1979 sale. The court also instructed the jury that co-conspirator statements made after the end of the conspiracy could be considered only against the person making them. Accordingly, the court did not commit reversible error in this regard.

III. CONCLUSION

For the reasons stated above, we affirm the convictions.

A true copy.

ATTEST:

CLERK U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS For the Eighth Circuit

No. 86-1439WM

United States of America,

Appellee,

vs.

John Peter Cerone,

Appellant.

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Appeal from the
United States District
Court for the Western
District of Missouri.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 23, 1987

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit.



APPENDIX C

United States of America
vs.
ANGELO LaPIETRA

United States District Court
Western District of
Missouri, Docket
No. 83-00124-11-CR-W-8

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date March 27, 1986.

 WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

 X WITH COUNSEL Louis Carbonaro

 GUILTY, and the court being satisfied that there is a factual basis for the plea,

 NOLO CONTENDERE,

 X NOT GUILTY

There being a verdict of

 NOT GUILTY. Defendant is discharged

 X GUILTY.

Defendant has been convicted as charged of the offense(s) of, from in or before January 1974 through September 30, 1983, conspiring with codefendants and with others to violate 18 U.S.C. § 1952 in violation of 18 U.S.C. § 371, as charged in Count One; and of traveling in interstate commerce or using a facility in interstate commerce with the intent to promote, manage, establish and carry on unlawful activities and aiding, abetting, counseling, commanding,

inducing and procuring the commission of said offenses, all in violation of 18 U.S.C. §§ 1952 and 2, as charged in Counts Two through Eight of the indictment.

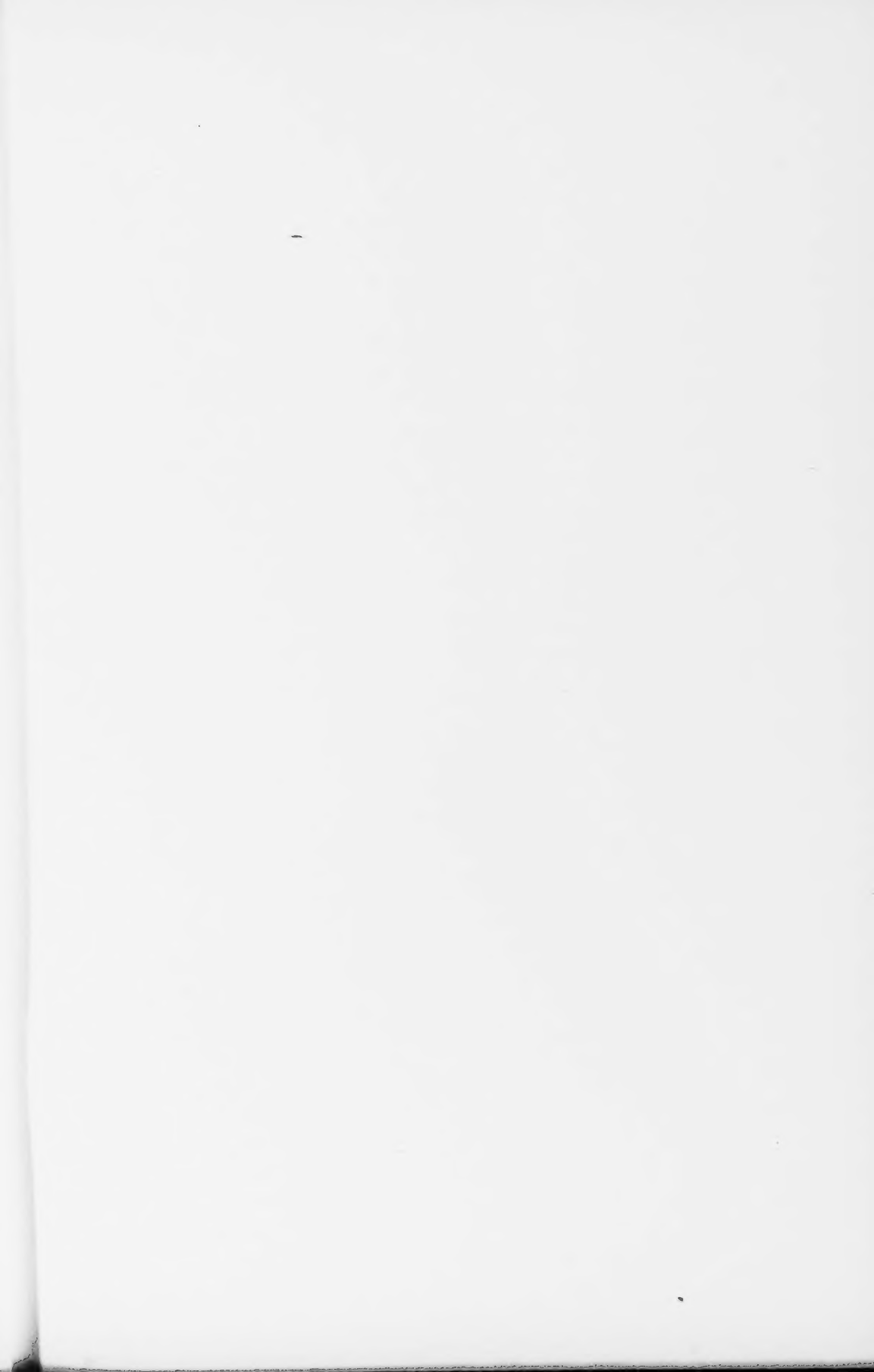
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby remanded to the custody of the Attorney General or his authorized representative for imprisonment for consecutive terms of two years on Counts One through Eight for a total sentence of sixteen years with parole eligibility to be governed by the provisions of 18 U.S.C. § 4205(a) and fined \$10,000.00 on each of those eight counts for a total amount of \$80,000.00. Defendant shall stand committed until said fines are paid in full or until he is otherwise discharged by law pursuant to 18 U.S.C. § 3565. Defendant is further ordered to make restitution to the State of Nevada in care of the Nevada State Gaming Control Board in the amount of \$30,750.50 in accordance with the provisions of the Victim and Witness Protection Act of 1982 and to pay \$32,659.48 in court costs.

* * * * *

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ JOSEPH E. STEVENS, JR.
U.S. District Judge

Date 3-31-86



In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED

Solicitor General

JOHN C. KEENEY

Acting Assistant Attorney General

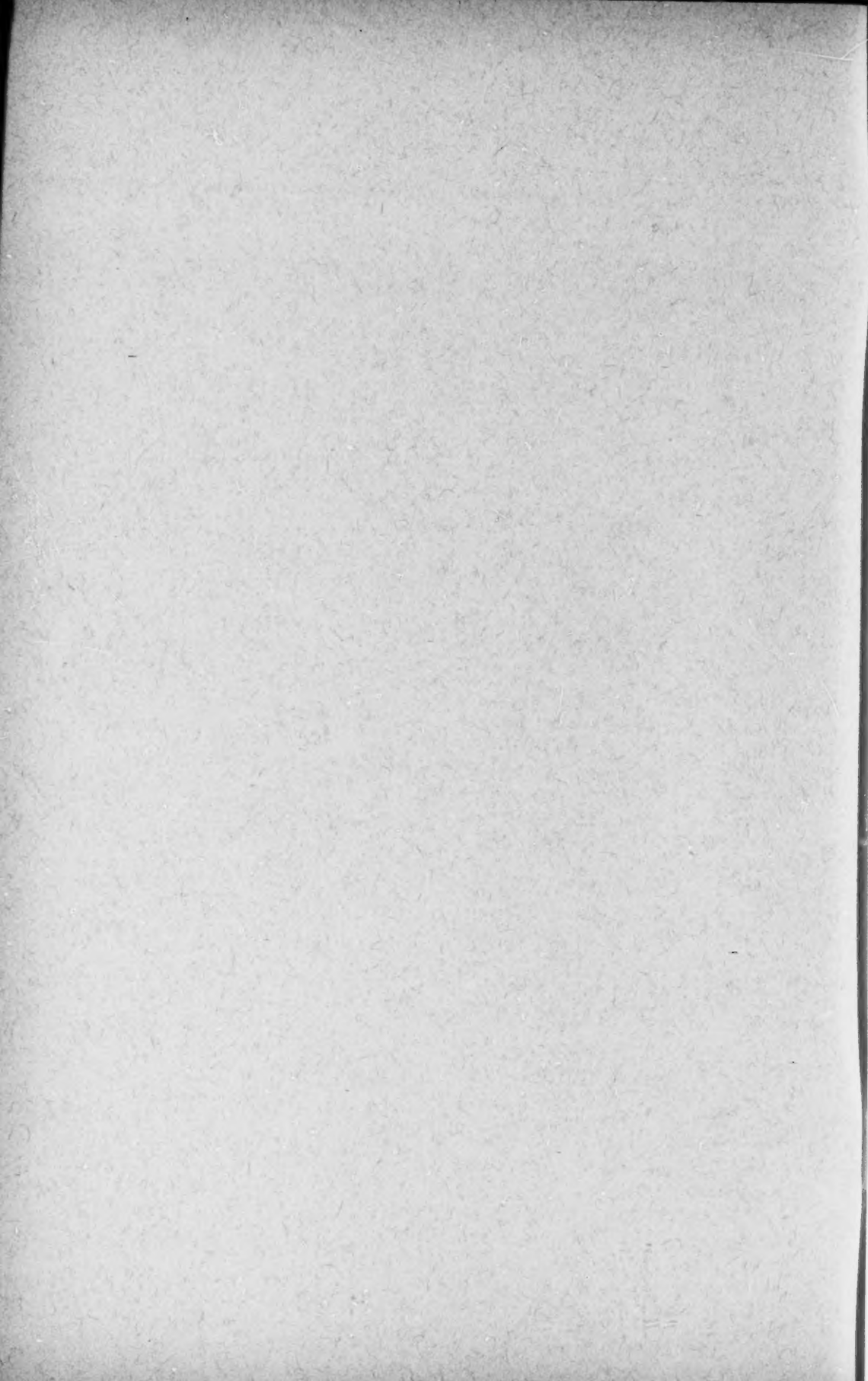
THOMAS E. BOOTH

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217



QUESTIONS PRESENTED

1. Whether the district court's instruction that everyone is presumed to know what the law forbids and what it requires to be done constituted harmless error.

2. Whether the Double Jeopardy Clause forbids separate convictions and sentences for the offenses of conspiracy to violate the Travel Act, 18 U.S.C. 1952, and a substantive violation of the Travel Act.

3. Whether this Court's decision in *Bourjaily v. United States*, No. 85-6725 (June 23, 1987), should be retroactively applied.

4. Whether the district court improperly precluded petitioner Rockman from offering evidence bearing on the admissibility of certain co-conspirator statements.

5. Whether a defendant who is indicted as an aider and abettor may be convicted as a principal pursuant to *Pinkerton v. United States*, 328 U.S. 640 (1946).

6. Whether the district court correctly instructed the jury on the law of conspiracy.

7. Whether the indictment sufficiently alleged violations of the Travel Act.

8. Whether there was sufficient evidence to support petitioner Cerone's conviction on one of the substantive Travel Act counts.



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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1365

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1409

ANGELO LAPETRA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1419

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1446

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1543

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (87-1365 Pet. App. A1-A25) is reported at 830 F.2d 938.¹

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for rehearing and rehearing en banc in No. 87-1543 was denied on December 15, 1987 (87-1543 Pet. App. C1). On February 12, 1988, Justice Blackmun granted an extension of time to and including March 14, 1988, within which to file a petition for a writ of certiorari, and the petition in No. 87-1543 was filed on that date. The petition for rehearing and rehearing en banc in No. 87-1365 was denied on December 16, 1987 (87-1365 Pet. App. B1), and the petition for a writ of certiorari in that case was filed on February 12, 1988. Petitions for rehearing and rehearing en banc in Nos. 87-1409, 87-1419, and 87-1446 were denied on December 23, 1987 (87-1409 Pet. App. B1; 87-1419 Pet. App. B1), and petitions for a writ of certiorari in Nos. 87-1409 and 87-1419 were filed on February 22, 1988 (a Monday). The petition for a writ of certiorari in No. 87-1446 was filed on February 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners were each convicted on one count of conspiring to travel in interstate commerce and to use interstate commerce facilities with intent to promote an unlawful activity, in violation of 18

¹ Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 87-1365.

U.S.C. 371; and on seven counts of traveling in interstate commerce or using interstate commerce facilities to promote unlawful activities, in violation of 18 U.S.C. 1952. Petitioners Aiuppa and Cerone were each sentenced to consecutive terms of imprisonment for four years on the conspiracy count and three and one-half years on each of the substantive Travel Act counts, for a total of 28 and one-half years' imprisonment. Petitioners Lombardo and LaPietra were each sentenced to consecutive terms of imprisonment for two years on each count, for a total of 16 years' imprisonment. Petitioner Rockman was sentenced to consecutive terms of imprisonment for three years on each count, for a total of 24 years' imprisonment. The court imposed cumulative fines of \$10,000 on each count as to each petitioner. On February 2, 1988, the district court, pursuant to Fed. R. Crim. P. 35, modified the sentences of Lombardo, Rockman, and LaPietra by requiring their sentences on the conspiracy count (Count 1) to run concurrently with their sentences on the first substantive count (Count 2), but leaving unchanged the consecutive sentences on Counts 2 through 8. The court modified Cerone's sentence by requiring his sentence on Count 1 to run concurrently with his sentences on Counts 2 and 3, but leaving unchanged the consecutive sentences on Counts 2 through 8. The court delayed ruling on Aiuppa's Rule 35 motion. 87-1543 Pet. App. B1-B6. The court of appeals affirmed (Pet. App. A1-A25).

1. The evidence at trial is summarized in the opinion of the court of appeals. It shows that petitioners and others sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and the Fremont casinos, in violation of Nevada gaming laws. The casinos were owned by the Argent Corporation which, in turn, was owned by Allen R. Glick. Glick's

purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators achieved control of the casinos by helping Glick obtain the financing to purchase them and by placing two of their confederates, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control over the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund, and Roy Williams, a Teamsters official. Pet. App. A2-A3.

The conspirators exercised control over Argent and the Teamsters Union by virtue of their membership in organized crime groups in various Midwestern cities. Petitioner Aiuppa was the boss of the Chicago organized crime group, petitioner Cerone was its underboss, and petitioners LaPietra and Lombardo were members of that group. Petitioner Rockman was an associate of the Cleveland organized crime group; co-conspirator Nick Civella headed the Kansas City organized crime group; and co-conspirator Frank Balistrieri was the boss of the Milwaukee organized crime group. Pet. App. A3.

In early 1974, Balistrieri agreed to help Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Civella and Rockman, who each controlled a trustee of the pension fund. After Glick obtained the loan and purchased the casinos, Balistrieri and others required Glick to appoint Frank Rosenthal to a management position at Argent. In that capacity, Rosenthal supervised the skimming of gambling proceeds from the casinos. Initially, the Kansas City, Milwaukee, and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose among the groups, and the Chicago group, including Aiuppa, Cerone, Lombardo,

and LaPietra, began sharing in the skimming proceeds. Pet. App. A3-A4.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. During the operation, LaPietra became DeLuna's contact with the Chicago group. Rockman was DeLuna's contact in the Cleveland group and also served as an intermediary in DeLuna's dealings with the Chicago group. Pet. App. A4.

The skimmed money was ordinarily delivered from Las Vegas to Chicago. LaPietra would deliver the money to a member of the Chicago group who, in turn, would deliver shares to DeLuna for the Kansas City group and to Rockman for the Cleveland group. Pet. App. A4.

During 1976-1979, the conspirators had several conversations in which they discussed replacing Rosenthal, who had become embroiled in widely publicized disputes with the Nevada licensing authorities. During the same period, Glick expressed reluctance to accept the conspirators' control of Argent through Rosenthal. Civella and DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal. Glick yielded to their demands. Sometime later, DeLuna told Glick that his "partners" were dissatisfied, and DeLuna threatened to kill Glick unless Glick sold Argent. In December 1979, Glick sold Argent to another company. Pet. App. A4-A5.

In October 1977, independent investment managers took control of the pension fund assets, hindering the conspirators' ability to control the fund. The conspirators, principally Lombardo and Allen Dorfman, held numerous strategy discussions concerning efforts to replace the independent managers with persons controlled by the conspirators. Between 1979 and 1981, the conspirators, in-

cluding Aiuppa, Cerone, Lombardo, and Rockman, supported Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later supported Jackie Presser to succeed Williams, in an effort to secure influence within the Teamsters' Union. Pet. App. A5.

2. The court of appeals affirmed (Pet. App. A1-A25). The court first held (*id.* at A8) that although petitioners were indicted as aiders and abettors in the Travel Act counts, there was no error in submitting those charges to the jury on a theory of vicarious liability under *Pinkerton v. United States*, 328 U.S. 640 (1946). Next, applying the analysis in *Blockburger v. United States*, 284 U.S. 299 (1932), the court concluded (Pet. App. A9-A13) that the Double Jeopardy Clause does not forbid separate convictions on the conspiracy and substantive Travel Act counts—even where, as here, liability on the substantive offenses is predicated on *Pinkerton*. The court rejected (Pet. App. A13-A15) on harmless error grounds petitioners' challenge to a portion of the jury charge that stated that "the presumption is that every person knows what the law forbids, and what the law requires to be done" (*id.* at A13). The court next found (*id.* at A17-A18) sufficient evidence to support the admission of the co-conspirator statements in the case. In reaching that conclusion, the court applied this Court's recent decision in *Bourjaily v. United States*, No. 85-6725 (June 23, 1987), but also found "direct evidence of the conspiracy and [petitioners'] participation in it" (Pet. App. A18 n.10). The court then upheld (*id.* at A20-A21) the instructions on conspiracy, rejecting as meritless the claim that the trial court had permitted the jury to convict on the conspiracy count if it found evidence that petitioners had aided and abetted a substantive offense. The court next determined (*id.* at A21) that the evidence, although circumstantial,

was sufficient to show that petitioner Cerone had traveled from Chicago, Illinois, to Kansas City, Missouri, for illegal purposes, as alleged in Count 7 of the indictment. The court also concluded (*id.* at A23) that the substantive Travel Act counts in the indictment were sufficient, noting that the indictment contained lengthy allegations of fact and provided ample notice of the acts with which petitioners were charged. Finally, the court held (Pet. App. A24-A25) that petitioner Rockman was not prejudiced by the trial court's exclusion of certain defense testimony regarding Glick's sale of his business interests in 1979—testimony that Rockman had offered purportedly to show that post-1979 co-conspirator statements were not made in the course of the conspiracy, as is required by Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. Petitioners first argue (87-1365 Pet. 11-18) that the trial court violated the Fifth and Sixth Amendments when it gave the following instruction (Pet. App. A13):

It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

The court of appeals did not approve of that instruction. Rather, it assumed (Pet. App. A15) that the instruction was erroneous. Applying this Court's decision in *Rose v. Clark*, 478 U.S. 570 (1986), however, the court of appeals held that on the present record the error was harmless.

Petitioners acknowledge (87-1365 Pet. 17) that *Rose v. Clark*, *supra*, applies, and they do not take issue with the court of appeals' analysis of the record. They simply con-

tend that it is “unclear” (87-1365 Pet. 18) whether the court of appeals found the challenged instruction to be harmless beyond a reasonable doubt. That claim is meritless. Although the court of appeals did not articulate the harmless error standard in so many words, it expressly adopted the analysis employed by this Court in *Rose v. Clark*, *supra*. There is no reason to believe that it did so erroneously.

2. Next, petitioners contend (87-1409 Pet. 8-19; 87-1419 Pet. 18-22) that the Double Jeopardy Clause prohibits separate convictions and sentences for conspiracy and substantive violations of the Travel Act. That contention is mistaken.

This Court has long held that separate convictions and punishments are permissible for ordinary substantive offenses and conspiracies to commit those offenses. See *United States v. Feola*, 420 U.S. 671, 693 (1975); *Callanan v. United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger v. United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit the imposition of separate judgments and cumulative punishment. In *Albernaz v. United States*, 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld

cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States v. Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).²

Under that standard, a conspiracy to violate the Travel Act and a substantive violation of the Act are separate offenses and may be separately prosecuted and punished. A conspiracy requires proof of an agreement, while a substantive offense does not; a substantive offense requires proof that the offense was consummated, while a conspiracy does not. The courts of appeals have uniformly

² Citing this Court's decision in *Whalen v. United States*, 445 U.S. 684 (1980), petitioners contend (87-1409 Pet. 12-13; 87-1419 Pet. 19-21) that the analysis under *Blockburger* should focus not on the elements of the offense but on the evidence introduced at trial. The *Whalen* case does not alter the traditional test. That case involved a prosecution for the offenses of rape and felony murder. Under the governing statute, felony murder could be committed in the course of any one of six specified felonies, including rape. The defendant was separately punished for both the rape and the felony murder committed in the course of the rape. The government contended that because felony murder could be proved by establishing a predicate other than rape, it followed that under *Blockburger* rape and felony murder could be separately prosecuted and punished. Applying the *Blockburger* test, this Court disagreed. The Court reasoned that the felony murder statute—which listed the six predicate felonies in the alternative—was functionally indistinguishable from a statute that separately proscribed six different species of felony murder under six statutory provisions. The Court therefore regarded each category of felony murder as, in substance, a separate offense, each with its own lesser-included predicate. Under the Court's analysis, therefore, all the elements of rape were included in the offense of felony murder by rape, and under *Blockburger* cumulative punishments would violate the Double Jeopardy Clause. In reaching that conclusion, however, the Court in *Whalen* was careful to point out that it was “not in this case apply[ing] the *Blockburger* rule to the facts alleged in a particular indictment” (445 U.S. at 694 n.8).

reached the same conclusion. See, e.g., *United States v. Nickerson*, 606 F.2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States v. Polizzi*, 500 F.2d 856, 897 & n.3 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States v. McGowan*, 423 F.2d 413, 415-417 (4th Cir. 1970).³

The analysis is no different even where, as here, petitioners' convictions on the substantive counts may have rested, under *Pinkerton*, on their participation in the conspiracy. To be sure, under *Pinkerton* each co-conspirator becomes liable for the substantive violations committed by his confederates in furtherance of the conspiracy. In that sense, the conspiratorial agreement is a necessary component of substantive liability under the *Pinkerton* theory. But conspiracy does not, for that reason, become a lesser-included offense of the substantive violation: the latter still requires a completed substantive offense, while the former requires the commission of an overt act that may have nothing to do with the substantive act that gives rise to *Pinkerton* liability. Under *Blockburger*, therefore, con-

³ Contrary to petitioners' contention (87-1409 Pet. 13-14; 87-1419 Pet. 19-21), the court of appeals' decision does not conflict with any decision of the Sixth Circuit. Indeed, the Sixth Circuit's decision in *Nickerson* is in accord with the decision reached by the court below. To be sure, the Sixth Circuit, in cases such as *Pandelli v. United States*, 635 F.2d 533 (1980), and *United States v. Austin*, 529 F.2d 559 (1976), has focused upon the actual evidence submitted at trial instead of the elements of the offenses. In a more recent case, however, the Sixth Circuit recognized that "[t]he *Austin* approach has not fared well in the other circuits" (*United States v. McCullah*, 745 F.2d 350, 355 n.6 (1984)), and it emphasized that under *Blockburger* separate prosecutions are permissible "when each offense requires proof of a fact that the other does not" (745 F.2d at 355). Moreover, in *United States v. Callanan*, 810 F.2d 544, 545-548 (1987), cert. denied, No. 86-6735 (Oct. 5, 1987), the Sixth Circuit reiterated that the *Blockburger* test focuses only on the statutory elements of the charged offenses. See also *United States v. Finazzo*, 704 F.2d 300, 305 (6th Cir.), cert. denied, 463 U.S. 1210 (1983).

spiracy and *Pinkerton* substantive liability are separate offenses and may be separately prosecuted and punished. Indeed, in *Pinkerton* itself, this Court upheld separate convictions and punishments for conspiracy and substantive offenses, even though liability on the substantive offenses was predicated on the doctrine of vicarious liability announced in *Pinkerton*. See also *United States v. Wylie*, 625 F.2d 1371, 1380-1382 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).⁴

3. Petitioners claim (87-1409 Pet. 20-24) that this Court's decision in *Bourjaily v. United States*, No. 85-6725 (June 23, 1987), should not be retroactively applied. They assert that the court of appeals therefore erred when it relied on *Bourjaily* in finding sufficient evidence to support the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). That contention has no merit.

In the *Bourjaily* case, this Court held that in determining whether a co-conspirator's statement may be admitted pursuant to Rule 801(d)(2)(E), a trial court may consider the statement itself, as well as other "independent" evidence, in assessing whether there was a conspiracy and whether the defendant and the hearsay declarant were members of that conspiracy. The courts of appeals have uniformly followed *Bourjaily* in resolving Rule

⁴ The Fifth Circuit's decision in *United States v. Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585, cert. denied, 446 U.S. 939 (1980), is not in conflict. There, the court held that the government could retry a defendant for conspiracy, following a trial in which the jury had been deadlocked on the conspiracy count but had acquitted the defendant on a series of substantive counts in which liability was based on *Pinkerton*. Although the court suggested in dicta (605 F.2d at 1367) that conspiracy may be a lesser-included offense of a substantive offense based on *Pinkerton*, the court did not resolve the issue due to "the procedural posture of th[e] case."

801(d)(2)(E) issues that have arisen since the *Bourjaily* case was decided. See, e.g., *United States v. Blackmon*, No. 86-1427 (2d Cir. Feb. 9, 1988), slip op. 6435; *United States v. Garner*, 837 F.2d 1404, 1415-1416 (7th Cir. 1987); *United States v. Knigge*, 832 F.2d 1100, 1103 (9th Cir. 1987); *United States v. Hernandez*, 829 F.2d 988, 993-995 (10th Cir. 1987). Petitioners offer no reason to adopt a different rule.

Moreover, there is no justification for refusing to apply the principles of *Bourjaily* in this case. First, the *Bourjaily* Court did not purport to be creating a new rule, contrary to one on which the defendants had relied. The *Bourjaily* Court simply construed a rule of evidence that has been in effect since 1975. And a rule of evidence of that sort is unlike a substantive rule of criminal liability on which individuals might rely in shaping their conduct. Petitioners do not contend — nor could they — that they engaged in the conduct at issue in this case in reliance on previous circuit law limiting the admissibility of co-conspirator declarations against them.

It would be pointless not to apply *Bourjaily* to this case. If this Court were to hold that the principles of *Bourjaily* should not have been applied on appeal, and if the Court were to reverse on that ground, that would normally entitle petitioners only to a new trial. At the new trial the district court would be obligated to apply the standard announced in *Bourjaily*. There is no reason to set aside a court of appeals' decision where, at any new trial, the legal principle adopted by the court of appeals would necessarily be applied by the trial court as well.

In any event, the present case is an inappropriate vehicle for resolving the issue of the "retroactive" application of *Bourjaily*. The district court (see 87-1409 Pet. 6), affirmed by the court of appeals (87-1365 Pet. App. A18 n.10),

found that there was sufficient independent evidence to justify submitting the co-conspirator statements to the jury. Petitioners' fact-bound challenge to that finding does not warrant further review. See *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-318 & n.5 (1985).

4. Petitioner Rockman contends (87-1543 Pet. 12-18) that the trial court improperly denied him the opportunity to introduce certain evidence that was intended to show that the conspiracy charged in the indictment ended in 1979 and thus that co-conspirator statements made after 1979 should not have been admitted under Fed. R. Evid. 801(d)(2)(E). The court of appeals acknowledged (Pet. App. A25) that it was "troubled" by the exclusion of that evidence, but it held that on the present record the exclusion did not constitute reversible error. That decision is clearly correct.⁵

During the defense case, Rockman attempted to show that the conspiracy charged in the indictment ended on December 26, 1979, when Glick sold his interest in the casinos. At trial, as here (87-1543 Pet. 6-11), Rockman contended that "[t]he object of the conspiracy was inextricably tied to the * * * 'gaming interests of Allen R. Glick' " (*id.* at 7). He asserted that when Glick lost his interest in the casinos, the conspiracy necessarily came to an end. In support of that theory, Rockman called Shannon Bybee as an expert on Nevada gaming laws. Rockman hoped to establish through Bybee's testimony that although Glick held a mortgage on the casinos after he

⁵ The court of appeals did not dispute petitioner's right to offer evidence that the conspiracy ended in 1979. Thus, this case does not present the question whether a defendant may offer evidence bearing on the trial court's preliminary determination, pursuant to Fed. R. Evid. 104(a), whether the factual predicates for the admission of a co-conspirator's statement have been established.

sold them, his stake was insufficient under Nevada law to constitute a financial interest in the casinos. The trial court permitted Rockman to ask Bybee various hypothetical questions concerning the circumstances under which Nevada gaming authorities would require that a mortgage holder obtain a gaming license. The court refused, however, to permit Rockman to ask Bybee three hypothetical questions in that line, holding that the proposed questions omitted material facts and were therefore misleading in the form propounded by Rockman. The court advised Rockman that he could ask those questions if he included the omitted material facts. Rockman failed to do so. Gov't C.A. Supp. Br. 11.

The trial court acted well within its discretion in refusing to permit Rockman to put those improper questions to the witness. In any event, as the court of appeals concluded (Pet. App. A25), any error in excluding Bybee's proposed testimony was entirely harmless. A fair reading of the indictment shows that the object of the conspiracy was to secure and maintain a financial interest in Glick's casinos—an object that did not abate when Glick gave up his personal stake in the operation. See C.A. App. 14. Thus, even if Rockman had succeeded in establishing that Glick had ended his financial interest in the casinos in 1979, the trial court was nevertheless correct in concluding that the conspiracy continued for several years thereafter and that co-conspirator statements made after 1979 were admissible under Fed. R. Evid. 801(d)(2)(E).

5. Petitioners contend (87-1419 Pet. 10-16; 87-1446 Pet. 6-15) that because they were named in the substantive Travel Act counts as aiders and abettors (except for Count 7, in which petitioner Cerone was named as a principal), the trial court erred when it submitted those counts to the jury on the theory that petitioners were liable as principals under *Pinkerton v. United States*, 328 U.S. 640 (1946).

In essence, petitioners claim that there was a fatal variance between the charges in the indictment and the theory on which the case was submitted to the jury. That claim is meritless.

The courts routinely hold that a defendant may be indicted as a principal but convicted on evidence showing that he aided and abetted the substantive offense.⁶ See, e.g., *United States v. Gordon*, 812 F.2d 965, 969 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987); *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States v. Kegler*, 724 F.2d 190, 201 & n.15 (D.C. Cir. 1983) (citing cases). The converse is also true: a defendant may be indicted as an aider and abettor but convicted on evidence showing him to be a principal. See, e.g., *United States v. Bryan*, 483 F.2d 88, 94-97 (3d Cir. 1973) (en banc); *United States v. Bell*, 457 F.2d 1231, 1235 (5th Cir. 1972); *United States v. Scandifia*, 390 F.2d 244, 250 n.6 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). Consistent with that general principle, the courts have regularly held that defendants may be convicted as principals under *Pinkerton*, even though they were indicted as aiders and abettors. See, e.g., *United States v. Meester*, 762 F.2d 867, 878 (11th Cir.), cert. denied, 474 U.S. 1024 (1985); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *United States v. Roselli*, 432 F.2d 879, 894-895 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). In the *Meester* case, for example, the court rejected the same claim pressed by petitioners, noting (762 F.2d at 878) that "[t]his is essentially an argument that the *Pinkerton* instruction constituted a variance from the charges con-

⁶ Indeed, the aiding and abetting statute, 18 U.S.C. 2, specifically provide that aiders and abettors are punishable as principals.

tained in the indictment. To benefit from any such variance, the appellants would have to demonstrate prejudice." Accord *Roselli*, 432 F.2d at 895.

In the present case, petitioners do not suggest how they were prejudiced, if at all, by the fact that the substantive Travel Act counts were submitted to the jury on a *Pinkerton* theory of liability. As in the *Roselli* case (see 432 F.2d at 895), petitioners were indicted on conspiracy charges, and thus had notice of, and an opportunity to contest, the essential element of *Pinkerton* liability. Moreover, the only additional factor under *Pinkerton*—whether the substantive acts were in furtherance of the conspiracy—"was not subject to argument in the context of this case" (*Roselli*, 432 F.2d at 895). In the absence of any showing of prejudice, petitioners' variance contention is insufficient.⁷

6. Petitioner Lombardo claims (87-1446 Pet. 15-16) that the instructions on the law of conspiracy were erroneous, in that the trial court "fail[ed] to limit the aiding and abetting instruction to the substantive counts" (*id.* at 15). The court of appeals examined the instructions and rejected petitioner's claim (Pet. App. A20-A21). It noted that the trial court had "correctly instructed the jury on the elements of conspiracy" (*id.* at A20) and that the aiding and abetting instructions "refer[red] to the substantive

⁷ Petitioners' contention (87-1419 Pet. 11-13) that the court of appeals' decision conflicts with *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980); *United States v. Alsobrook*, 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980); and *United States v. Miller*, 552 F. Supp. 827 (N.D. Ill. 1982), *aff'd mem.*, 729 F.2d 1464 (7th Cir. 1984) (Table), is without merit. None of those cases involved the question whether a defendant who is indicted as an aider and abettor may nevertheless be convicted on evidence showing that he was a principal under *Pinkerton*.

Travel Act offenses, not conspiracy" (*id.* at A21). Lombardo offers no reason to reject that conclusion.

7. Petitioners contend (87-1419 Pet. 6-10; 87-1446 Pet. 17-20) that the Travel Act counts in the indictment did not state an offense. That fact-bound challenge merits no review.

Count 7 of the indictment (C.A. App. 37-38), which is representative of each of the seven substantive Travel Act counts, alleged, in pertinent part, that on or about January 11, 1979, petitioner Cerone traveled in interstate commerce from Chicago, Illinois, to Kansas City, Missouri, for the purpose of meeting with Carl Civella, Nick Civella, and Carl DeLuna

to discuss matters pertinent to the sale of or transfer of ownership of the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving the management, operation, conducting and carrying on of gambling operations of licensed gaming establishments in Las Vegas, Nevada, that is, the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, and the indirect receipt of moneys played therein, by persons who were not licensed by, and whose interest in said gaming establishments had been concealed from the Nevada Gaming Control Act * * * and regulations of the Nevada Gaming Commission * * * and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of

said unlawful activity and [petitioners and others] did aid, abet, counsel, command, induce and procure the commission of said offense.

Under Fed. R. Crim. P. 7(c)(1) an indictment need only be "a plain, concise and definite written statement of the essential facts constituting the offense charged." The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States v. Debrow*, 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States v. Bailey*, 444 U.S. 394, 414 (1980); *Hamling v. United States*, 418 U.S. 87, 117-118 (1974). To meet that standard, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished'" (*Hamling*, 418 U.S. at 117, quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)).⁸

An indictment under the Travel Act requires an allegation of " '(1) [travel in] interstate commerce or use of an interstate facility, (2) with intent to promote an unlawful activity, and (3) a subsequent overt act in furtherance of that unlawful activity.' " *United States v. Brown*, 770 F.2d

⁸ As this Court has put it, " 'the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.' " *Armour Packing Co. v. United States*, 209 U.S. 56, 84 (1908) (citation omitted).

768, 772 (9th Cir.) (citation omitted), cert. denied, 474 U.S. 1036 (1985). In this case, each substantive Travel Act count tracked the statutory language and stated each of the prescribed elements. "Because the Travel Act fully and unambiguously sets out the essential elements of the offense, indictments drafted substantially in its language are sufficient." *United States v. Stanley*, 765 F.2d 1224, 1239-1240 (5th Cir. 1985). *Accord Turf Center, Inc. v. United States*, 325 F.2d 793, 796, 797 (9th Cir. 1963).

8. Petitioner Cerone contends (87-1419 Pet. 16-18) that the evidence was insufficient to support his Travel Act conviction on Count 7. Count 7 alleged that on or about January 11, 1979, Cerone traveled from Chicago, Illinois, to Kansas City, Missouri, to meet with DeLuna, Carl Civella, and Nick Civella, to discuss the sale of the Stardust and Fremont casinos (C.A. App. 37-38). The court of appeals conducted a meticulous review of the record and concluded that the evidence on that count was sufficient (Pet. App. A21). As the court explained, the evidence showed that Cerone lived in Chicago. On January 11, 1979, FBI agents observed Carl DeLuna pick up two men at the Kansas City airport and take them to Anthony Civella's residence. DeLuna later drove Cerone back to the airport in the same car that was observed earlier. Cerone was then seen leaving Kansas City and arriving at the Chicago airport. In addition, notes taken by DeLuna and admitted at trial recorded that DeLuna met with Cerone and Civella on January 11, 1979, to discuss negotiations to buy Argent. That evidence, the court of appeals concluded (*ibid.*), "would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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